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Nos. 744 and 783

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CHARLES ELMORE CROPLEY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1941

UNITED STATES OF AMERICA,
Petitioner,

vs.

WRIGHTWOOD DAIRY COMPANY,
Respondent.

WRIGHTWOOD DAIRY COMPANY,
Cross-Petitioner,

vs.

UNITED STATES OF AMERICA,
Cross-Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF WRIGHTWOOD DAIRY COMPANY, RESPONDENT AND CROSS-PETITIONER.

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF WRIGHTWOOD DAIRY COMPANY, RESPONDENT AND CROSS-PETITIONER.

The opinion of the Circuit Court of Appeals (R. 270) has been reported in 123 F. (2nd) 100.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on October 27, 1941 (R. 275). The petition for certiorari in No. 744 was filed November 14, 1941, and the cross-petition for certiorari in No. 783 was filed December 4, 1941. Both petitions were granted December 8, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

Petitioner, does not, in its brief, correctly set forth the questions presented in No. 744.

(1) The question is *not* as set forth in Point 1 (under 1) "Whether Federal regulation of the price of intrastate milk sold in competition with interstate milk *is permissible* under the commerce clause of the Constitution and the Agricultural Marketing Agreement Act of 1937," but rather whether the Respondent, defendant below, who admittedly was engaged solely in intrastate commerce and whose milk was in no wise inter-mingled with milk which crossed state lines, was a handler of milk as defined in Section 8c(1) of the Agricultural Marketing Agreement Act of 1937 and in Section 941.1(a)(4) of Order No. 41, and as such was subject to the applicable provisions of the Act and the Order.

It is not contended by petitioner that the milk handled by the Respondent is in the current of interstate commerce or directly burdens, obstructs or affects interstate commerce in such commodity, but it is contended by the petitioner that the Agricultural Marketing Agreement Act of

1937 regulates milk wholly intrastate in character and handling *where the point of impingement of the intrastate transaction is one of competition only.*

(2) The alleged question whether the District Court had jurisdiction to enjoin United States and its officials from enforcing Order No. 41 against the Respondent, now for the first time urged in this Court, is not involved herein. This question was not raised or argued in the District Court or in the United States Circuit Court of Appeals.[1]

In No. 783 the following questions are presented:

(3) Whether the District Court erred in striking the Respondent's fourth (4th) to eleventh (11th) defenses, inclusive.

(4) Whether the District Court erred in finding that Order No. 41 was issued in full compliance with the law and that all conditions precedent to its effectiveness had occurred.

(5) Does this case present a moot question in view of the abandonment of Order No 41 by the Secretary of Agriculture during the pendency of the cause when he promulgated Order No. 41, as amended, in its place.[2]

The foregoing questions include the questions presented by petitioner in its brief and other related questions, hereinafter discussed.

THE STATUTES AND ORDERS INVOLVED.

The Statute involved is the Act of May 12, 1933, (48 Stat. 31) as amended August 24, 1935 (49 Stat. 750), and as reenacted and amended in the Agricultural Marketing Agree-

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[1] See brief filed in the United States Circuit Court of Appeals No. 7619.

[2] See Respondent's Twelfth Defense (R. 118-119).

ment of 1937, approved June 3, 1937 (50 Stat. 246) (7 U. S. C. A. Sec. 601 *et seq.*) herein referred to as the "Act".

Order No. 41 herein relied upon by the petitioner regulating the handling of milk in the Chicago, Illinois marketing area was promulgated by the Secretary of Agriculture on August 28, 1939, effective September 1, 1939 (R. 8-22).

On June 21, 1940, during the pendency of this action below, the Secretary of Agriculture promulgated another order effective July 1, 1940, Order No. 41 as amended, in the place of said Order No. 41.[3]

* * *

STATEMENT.

Order No. 41, herein relied upon by the Government, was promulgated by the Secretary of Agriculture under the following circumstances:

The uncontradicted evidence shows that the Secretary of Agriculture gave notice of a public hearing on June 9, 1939, regarding a proposed marketing agreement and order regulating the handling of milk "prepared and proposed by the Pure Milk Association and the Chicago Milk Producers Council, Inc.", covering the territory lying within the limits of Chicago, Illinois, and all that territory lying within the boundaries of Cook County, Du Page County, in the State of Illinois, and townships of Wheaton, Du Page, Plainfield, Lockport, Homer, Troy, New Lenox, Frankfort and Crete, in Will County, in the State of Illinois, and the

[3] Order No. 41, as amended, established *inter alia* a new marketing area and materially changed the various classes of persons who were subject to its provisions and reclassified its products and substituted different provisions. The amended Order did not preserve any existing rights under Order No. 41 (R. 120-141).

townships of St. John, Ross, North Calumet, and Hobart, in Lake County, in the State of Indiana (Defs. Ex. 1, p. 28).

All of the evidence taken at the hearing was with respect to the proposed marketing agreement and the proposed marketing area as therein defined.[4]

The Secretary of Agriculture apparently decided not to proceed with the proposed marketing agreement and order, and no action was taken thereon. On August 18, 1939, without notice of and without an opportunity for a hearing thereon, the Secretary of Agriculture submitted *to some of the producers, but not to all*[5] for referendum, *a new and different marketing agreement or Order No. 41*,[6] covering a much smaller territory, namely the City of Chicago, Evanston, Wilmette, Kenilworth, Winnetka and Glencoe in the State of Illinois and containing different provisions.

In the referendum all of the producers selling milk in the area were not notified by the Secretary of Agriculture and did not participate therein, and said Order was not approved or favored by two-thirds (⅔) of all of the producers in the area.

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[4] Respondent, defendant below, introduced at the hearing defendant's Exhibits 1, 2, 3 and 4 which are admitted by petitioner, plaintiff below, to constitute all of the evidence upon which the Secretary of Agriculture made his findings and fixed the terms and provisions contained in Order No. 41 (R. 201). This record has not been reprinted but has been certified to the Court in its original form.

[5] See affidavit of Mr. Connor, Referendum Agent (R. 115) and testimony of Mr. Krueger, Chief Sanitary Officer of Board of Health of City of Chicago (R. 220, 221).

[6] See Order No. 41 (R. 8-22) and compare with Marketing Agreement set forth and considered at public hearing defendant's Exhibit 1, p. 28, attached as an appendix hereto, p. i.

PLEADINGS AND PROCEEDINGS.

(1) The Complaint.

The complaint was filed December 26, 1939, by United States of America, petitioner herein, in which it sought to compel Respondent to comply with Order No. 41 (R. 2-7). It alleged that the Order was issued in full compliance with the Act and that all conditions precedent to its effectiveness have occurred; that since prior to the effective date of this order, the defendant, an Illinois corporation, has been engaged continuously in purchasing and receiving milk from producers, associations of producers, or other handlers, all or a portion of which milk is disposed of as milk or cream in the marketing area; that the milk handled by the said defendant is processed by the defendant in its plant in Chicago and is sold and distributed within the area in competition with all other milk sold in said area. It is conceded that the defendant purchased all of its milk from producers located within the State of Illinois, but it is alleged that such handling of milk by the defendant is in the current of interstate commerce as defined in Section 10 (j) of the Act, or directly burdens, obstructs, or affects interstate commerce in milk marketed within the area and that the defendant, is, therefore, a handler of milk as defined in Sec. 8c (1) of the Act and in Sec. 941.1(4) of the Order, and as such is subject to the applicable provisions of the Act and of the Order.

The complaint further alleged that the defendant has failed and refused to make the required reports to the market administrator and sought a preliminary and permanent injunction against the defendant preventing and re-

straining the defendant from violating the provisions of the Order and commanding the defendant to comply with all the provisions of the Order.

(2) The Answer.

The answer of the defendant sets up twelve (12) separate defenses.

a. *The First Defense.*

The first of these defenses asserts that the complaint fails to state a claim against the defendant on which relief can be granted.

b. *The Second Defense.*

The second defense contains the defendant's response to the specific allegations of the complaint. The substance of this response is as follows: The defendant admits that it is a corporation organized and existing under the laws of the State of Illinois and having its principal place of business at 2942 North Ashland Avenue, Chicago, Illinois; that since and prior to the effective date of the order it has been engaged continuously in purchasing and receiving milk from producers, associations of producers, or other handlers, all of which milk is disposed of as milk or cream in the marketing area; and that it purchases, and for some time past has purchased, approximately 30,000 pounds of milk a day from approximately 70 producers located entirely within the State of Illinois, and no part thereof is purchased from any producer located outside of the State of Illinois; that said milk is processed by said defendant in its plant at Chicago and sold and distributed entirely within the Chicago marketing area within the State of Illinois and that no portion thereof is intended to be sold, or is sold, for use outside the State of Illinois.

The defendant denies that the Order was issued in full compliance with law (R. 84); denies that its handling of milk is in the current of interstate commerce or directly burdens, obstructs or affects interstate commerce in milk marketed within the area, denies that it is a handler of milk as defined in Sec. 8c (1) of the Act and in Sec. 941.1 (4) of the order; denies that approximately 40% of all the milk sold in the area is directly in the current of interstate commerce; denies that there is any current of interstate commerce in the marketing area; denies that any portion of the milk handled by the defendant prior to its ultimate disposition by the defendant is physically and inextricably intermingled in the processing plant of the defendant with milk which has crossed state lines; denies that unless all milk sold in the area, whether or not physically intermingled, is subject to the same regulation as the milk which has crossed state lines on its way into the area, discrimination will result against the milk which has moved in the current of interstate commerce, as such milk will be unable to compete with unregulated milk in the area, and that such discrimination would lead to unstable and disorderly marketing conditions and prevent the effectuation of the purpose of the Act, as alleged in paragraph 7 of the complaint; denies that the defendant's failure to comply with the provisions of the Order would deprive the producers in the market of money which is rightfully theirs, and asserts that, on the contrary, "said producers so engaged in interstate commerce would not be entitled to any contribution from this defendant and that the enforcement of the said Order against this defendant would result in taking the defendant's property without due process of law in violation of the Fifth Amendment to the United States Constitution" (R. 84-87).

Finally, the second defense sets up an averment that the order was not "approved or favored by at least two-thirds

of all the producers who during the representative period determined by the Secretary were engaged within the production area in the production for market of the milk, or engaged in the production of milk for sale, in the marketing area, as set forth in the Order * * *." (R. 87).

c. *The Third Defense.*

The third defense alleges that the plaintiff is not entitled to any relief because the Acts of Congress under which these proceedings are brought have no application to this defendant; that the defendant is engaged entirely in intrastate business in the State of Illinois, the purchasing all of its milk, and the processing and sales of its milk was confined within the limits of the State of Illinois; that none of the milk handled and processed by said defendant is directly or indirectly in the current of interstate commerce, and that no portion of the milk handled by the defendant, prior to its ultimate disposition by the defendant, is physically and inextricably in any wise intermingled in the processing plant of said defendant with milk which has crossed state lines; that the handling of said milk by the defendant did not directly burden, obstruct or affect interstate or foreign commerce in such commodity; that it appears from the records and proceedings of Congress at the time said Acts were enacted and amended that Congress did not intend to include any handler of agricultural products who was engaged solely in intrastate business, as shown by the reports of committees of the House of Representatives and of the Senate of the United States, in 1935, that the powers to be exercised by the Secretary of Agriculture under said Acts were to be confined within the limitation upon the federal authority over interstate commerce as expressed by the Supreme Court in *Schechter* v. *United States,* 295 U. S. 495; that the amendments to the Agricultural Adjustment Act made by Congress on August 24, 1935, and as

re-enacted and amended in the Agricultural Marketing Agreement Act of 1937, approved June 3, 1937, would not have been enacted by the United States Senate except upon the express understanding that it was the sense of the Senate that those in charge of the administration of this provision would have no right to issue orders which would take over the Government or control or the price fixing or any other phase of the milk situation where the milk is produced and where it is sold always within the same state, and that any other construction subjecting this defendant to the provisions of this Act would constitute and be a violation of the Commerce Clause, Article I, Section 8, Clause 3, and of Article X of Amendments to the United States Constitution, and render said Act therefore unconstitutional and void (R. 87-89).

d. *The Fourth Defense.*

The fourth defense challenges the Secretary's adoption of the post-war period, 1919-1929, in determining the purchasing power of milk for the purposes of the order and asserts that by reason thereof, the Order is repugnant to the provisions of the Act, and, therefore is illegal and void. (R. 89-91).

e. *The Fifth Defense.*

The fifth defense asserts that the Act delegates legislative powers to the Secretary and is therefore unconstitutional. (R. 91-92).

f. *The Sixth Defense.*

The sixth defense asserts that the Order "creates, fosters, and provides for an unlawful monopoly * * *," is contrary to the federal anti-trust laws and is, therefore, invalid. (R. 92-93).

g. *The Seventh Defense.*

The seventh defense asserts that the Order is contrary to the positive law and the public policy of the State of Illinois with respect to restraints of trade and is, therefore invalid and void under Articles IX and X of the Amendments to the Constitution of the United States (R. 93-94).

h. *The Eighth Defense.*

The eighth defense asserts that the definition of the term "producer" contained in the Order is contrary to the provisions of Sec. 8c (5) (G) of the Act (Title 7 U. S. C. A. Sec. 608c (5) (G) and "illegally delegates legislative authority to any health authority, whether federal, state, municipal, public or private * * *" and that, therefore, the Order is invalid (R. 94-95).

i. *The Ninth Defense.*

The ninth defense asserts that said Order No. 41 did not become effective and is, therefore, null and void, in that the referendum conducted by the Secretary of Agriculture pursuant to Section 8c (9) and 8c (19) was not a referendum of all of the producers who during the representative period determined by the Secretary were engaged within the production area specified of such commodity for sale in the marketing area specified in such marketing Order, and that said Order was not in fact approved or favored by at least two-thirds of all of the producers as required in and by Section 608c (9) of said Act, and that such action was contrary to the provisions of the Act and that, therefore, the Order never became effective for want of the requisite producer approval (R. 96).

j. *The Tenth Defense.*

The tenth defense asserts that, by reason of its failure to include in the territory comprising the marketing area other cities, towns and villages, such as, Oak Park, Berwyn, Cicero, Elmwood Park, Maywood, River Forest, Chicago Heights and others, the Order is unlawful, discriminatory, unreasonable and void (R. 97).

k. *The Eleventh Defense.*

The eleventh defense sets forth certain economic facts and statistics intended to show that the effect of the Order will be an increase of the surplus of milk in the market, and asserts that the Order is economically unsound and will not accomplish the declared purpose of the Act and is, therefore, "unreasonable, unenforceable and void" (R. 97-99).

l. *The Twelfth Defense.*

On September 9, 1940, the defendant by leave of court filed a supplemental answer setting forth a twelfth defense in which it was asserted that by reason of the fact that on July 1, 1940, certain amendments to the order had been issued by the Secretary June 21, 1940, and had become effective July 1, 1940, the order, as originally issued, had become inoperative, void, and unenforceable and the action had become moot (R. 118-119). A copy of the order, as amended June 21, 1940, was attached to the supplemental answer as Exhibit A and appears in the record at pages 120-141, inclusive. Respondent's motion to require petitioner to reply to said twelfth defense was denied (R. 117), but the petitioner filed a supplemental motion for summary judgment admitting therein that Order No. 41, as amended, issued by the Secretary of Agriculture of the United States on June 21, 1940, effective July 1, 1940, was so promulgated by the Secretary of Agriculture (R. 144-145).

m. *The Counterclaim.*

The counterclaim reiterates the facts asserted in the answer with respect to the organization of the defendant and the operation of its business and asserts that the defendant is not a handler subject to the Order. The counterclaim further incorporates the third to eleventh defenses, inclusive, pleaded in the answer, and asserts that by reason thereof the Act and the Order are not valid and enforceable as against the defendant. The counterclaim prays that the complaint be dismissed and that the court issue a permanent injunction preventing and restraining the plaintiff from enforcing the Order or any of its provisions against the defendant (R. 99-101).

(3) Petitioner's motions to strike and for summary judgment.

Plaintiff below, petitioner herein, filed its motion to dismiss defendant's counterclaim (R. 101) and to strike the third to eleventh defenses of respondent's answer (R. 156). The Court denied the motion to dismiss the counterclaim and the motion to strike the third defense, but sustained the motion to strike the fourth to eleventh defenses (R. 244). The striking of these defenses is one of the questions to be reviewed in Cross-Petition No. 783.

On June 19, 1940, plaintiff moved (R. 105-112) for a summary judgment in its favor on affidavits filed and served with the motion. Respondent filed a motion to strike said affidavits and parts thereof on the ground, amongst others, that the affidavits and material allegations therein contained were based upon hearsay and failed to contain sworn and certified copies of all papers and parts thereof therein referred to as required by Rule 56, of the Rules of Civil Procedure, were argumentative, and contained conclusions of law and not statements of fact. (R. 145-154).

This motion was partially heard (R. 154) and continued to a later date. No formal order was entered thereon but presumably was considered by the court at the time plaintiff's motion for summary judgment was denied (R. 157-159).

(4) The Court's decision, findings and final judgment.

The Court found as a fact that the defendant in the handling of milk was engaged in intrastate business and was not in the current of interstate or foreign commerce and did not directly burden, obstruct or affect interstate commerce of milk marketing within the Chicago, Illinois area, and found as a matter of law that said Order did not apply to the defendant, and that the defendant is not a handler of milk as defined in Sec. 8c (1) of the Agricultural Marketing Agreement of 1937 and in Sec. 941.1 (a) (4) of the Order, and is as such not subject to the applicable provisions of the Act and of the Order (R. 246-247). The Court has found that the Order was issued by the Secretary in full compliance with the law and that all conditions precedent to the effectiveness have occurred (R. 245-246). This finding is another question to be reviewed in the cross-petition in No. 783. The court entered final judgment dismissing the complaint filed by the petitioner and granted the respondent the injunctive relief prayed for in the counterclaim (R. 247-248). The Circuit Court of Appeals affirmed the judgment, but that court, in view of its decision, deemed it unnecessary to discuss the errors assigned by cross-petitioner and dismissed said cross-appeal (R. 275). The failure of the lower court to consider the errors relied upon and urged on cross-appeal and in dismissing the cross-appeal is the subject matter of cross-petition on No. 783.

(5) Specification of errors to be urged in support of cross-petition in No. 783.

The Circuit Court of Appeals erred in refusing to consider the errors, and each of them, relied upon by cross-petitioner in its cross-appeal in that court, and in dismissing said cross-appeal.

Specifically, the Circuit Court of Appeals erred:

1. In failing to find that the District Court should have found from the uncontradicted evidence and the law that Order No. 41 was not in compliance with the law and that all conditions precedent to the effectiveness of said Order had not occurred and that said Order was therefore contrary to the provisions of the Act in question and therefore invalid and not enforcible.

2. In failing to find that the District Court erred in sustaining plaintiff's motion to strike defendant's fourth to eleventh defenses, and each of them, filed by defendant to plaintiff's complaint.

3. In failing to hold that the case presented only a moot question, since Order No. 41 became ineffective during the pendency of the cause in the District Court.

SUMMARY OF ARGUMENT.

PART ONE.

I.

The intrastate distribution of products in competition with interstate commerce is not subject to federal regulation.

A. *United States* v. *Rock Royal Co-operative, Inc.*, and other cases relied upon by petitioner do not dispose of the constitutional and statutory questions raised for the first time by petitioner herein.

B. Congress may not under the Commerce Clause regulate purely intrastate transactions where the point of impingement of the intrastate transactions upon interstate transactions is one of competition only. Such a construction would violate the Tenth Amendment of the Constitution. While Congress is authorized by the Commerce Clause of the Constitution to regulate commerce among the several States, it does not authorize Congress under the guise of regulating interstate commerce between States to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce.

Where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of the State power. A commodity wholly intrastate in character and handling does not directly burden, obstruct or affect interstate commerce where the point of impingement of the intrastate transactions upon the interstate transactions is one of competition only. *Schechter* v. *United States*, 295 U. S. 495, 520, 548.

C. Congress did not intend, in passing the Agricultural Marketing Agreement Act of 1937, and prior acts, to assume control of purely intrastate transactions, and the Act itself contains no such provisions. Both the Senate and House reports and Senate debates involving the Act in question, clearly show that Congress intended that the proposed Bill be confined within the limitation of the Federal authority over interstate commerce, as expressed by the Supreme Court in the *Schechter* case, and that it would not apply to a situation where milk was produced and where it is sold within the same State. That competition was not to be the basis of the point of impingement upon interstate commerce by an intrastate transaction is evidenced by the fact that Congress expressly omitted such provisions from a prior Act. The fact that Congress in subsequent legislation on the same subject used different language indicates a manifest intention to change the law.

The contention of petitioner presents a dangerous and revolutionary construction of the Commerce Clause which would enable the Federal Government to control every enterprise, every occupation and every activity of the people merely by showing that the product involved is in competition with similar products which cross State lines. Such a restriction would reach all enterprises and transactions which were in competition with those of other States and the authority of the State over its domestic affairs would exist only by sufferance of the Federal Government.

II.

Petitioner is precluded from urging that the Court had no jurisdiction to issue an injunction against the United States, having failed to urge this point in the lower Courts. The injunction was nevertheless properly granted under

the Tucker Act of March 3, 1887, as amended, 28 U. S. C. A. 41 (20); *United States* v. *Shaw*, 309 U. S. 495, relied upon by petitioner has no application to the case here under consideration.

PART TWO.

I.

The District Court erred in finding, contrary to the law and the evidence that the Order was issued by the Secretary in full compliance with the law and that all conditions precedent to the effectiveness of said Order have occurred. The Statute was not followed in that:

1. The Secretary of Agriculture did not give due notice of an opportunity for a hearing upon Order No. 41. There was no hearing had with respect to Order No. 41. No notice or opportunity for a hearing was given by the Secretary of Agriculture to the producers or handlers of the product contrary to the express provisions of the Act. The public hearing, upon which the Secretary of Agriculture relies, was with reference to another marketing agreement differing materially in substance from that of Order No. 41, so that it cannot be said that the hearing upon the former was also a hearing upon the latter. The Act clearly contemplates that a hearing must be held before any order issued pursuant to the Act may become effective. Section 8c(9).

2. The Order never became legally effective because the required approval of producers was never properly secured. This was made a condition precedent under Section 8c(9) of the Act.

(a) The Order is void on its face in failing to comply with Sections 8c(4) and 8c(9) of said Act.

The recital in the Order that over sixty-seven (67%) per cent of the producers voting in a referendum had approved or favored the Order does not comply with the requirements of said sections and said order is therefore unenforcible and void.

(b) The Order is illegal in that all of the producers entitled to participate in the referendum under the Act were not notified nor permitted to participate therein. The uncontradicted evidence shows that all producers who were entitled to vote under Section 8c(9) were not requested to participate in the referendum on the tentatively proposed marketing agreement or order.

3. The Order is contrary to the express provisions of Section 8c(5)(G) of the Act and other provisions thereof, and therefore void.

4. The Order is contrary to the express provisions of Sections 2 and 8c of the Act and therefore void. The Secretary adopted the post-war period, August 1909-July 1929, as the base period instead of the pre-war period, August 1909-July 1914, as in Section 2 of the Act expressly provided. While the Secretary is permitted, under Section 8e, to use the post-war period instead of the pre-war period, as provided in Section 2, it is conditioned upon the Secretary finding and proclaiming in the Order that the satisfactory statistics were not available for the base period in Section 2. This finding must be explicitly set forth in the order under Section 8c(4) and a failure so to do is a fatal defect, (*Panama Ref. Co.* v. *Ryan*, 293 U. S. 388, 432,) and the law is not satisfied by a separate proclamation.

II.

The District Court committed prejudicial error in striking defendant's fourth to eleventh defenses, both inclusive. Some of these defenses were argued under Point I *supra*.

1. The fifth defense alleged that the Act is unconstitutional and void in that it delegates the Secretary legislative powers contrary to Article 1, Section 1, and Article 1, Section 8, Paragraph 18, of the Constitution of the United States; and that the Order promulgated therein is therefore void and unenforcible. Section 8c(18) and Section 10(c) contain invalid delegation of legislative power. The orders and regulations issued under them by the Secretary are prejudicial to the respondent.

2. The sixth defense and seventh defense assert that the Act is invalid as being in conflict with the anti-trust laws of the United States and of the State of Illinois. The Act in question contains no provision exempting persons who participate in the price fixing pool or trust created by the Act from the provisions of the anti-trust laws of the United States or of the State laws. In the absence of such provision exempting the producers and handlers of milk from complying with the Order, the handlers or producers would nevertheless be subject to prosecution under the Federal and State anti-trust laws.

3. The tenth defense alleges that said Order is unlawful, discriminatory, unreasonable, void and contrary to the Act in that the Secretary arbitrarily designated in Section 941.10 a certain "Chicago, Illinois Marketing Area" and arbitrarily omitted therefrom other cities, towns and villages marketing milk under the same and similar circumstances located in the same county and state adjoining said marketing area. The merit of respondent's contention was recognized by the Secretary of Agriculture in the amended

order promulgated by the Secretary, effective July 1, 1940, wherein the marketing area is enlarged to include the Village of Oak Park. The designation of the so-called Chicago, Illinois marketing area by the Secretary violates Section 8c(11)(B) of said Act, which, by its provisions, makes it a question of law for the courts to determine whether or not it, as promulgated by the Secretary, actually complied with the requirements of the Acts of Congress.

4. The eleventh defense sets forth that the Order is unenforcible, discriminatory, unreasonable and void in that it is contrary to the declaration of conditions and declaration of the policy of Congress, as set forth in Section 1 and Section 2 of said Act. Section 2 of said Act expressly provides that Congress authorized no action under said title contrary to the declaration policy of Congress. It is therefore the duty of the courts to determine whether the Order promulgated by the Secretary is in conformity with the declared policy of Congress and whether such action was in fact authorized by law.

5. The twelfth defense alleges that during the pendency of said cause the Secretary promulgated an amended order which neither suspended nor terminated Order No. 41, but repealed the same. The case now presents only a moot question.

ARGUMENT.

PART ONE.

I.

The intrastate distribution of products in competition with interstate commerce is not subject to federal regulation.

It is conceded that respondent purchased its total daily milk requirements from producers located entirely within the State of Illinois and processed the milk in its Chicago plant without interminglingit with any milk which had crossed the state lines, and sold and distributed the processed product solely within the State of Illinois. It is evident, therefore, that respondent was engaged in an intrastate business and was not in the current of interstate commerce. Nevertheless, petitioner contends that respondent is a handler within the meaning of and subject to the provisions of the Agricultural Marketing Agreement Act of 1937 and of the Order No. 41 on the ground that the product handled by respondent was *in competition* with interstate commerce and therefore subject to federal regulation.

In other words it is petitioner's contention that a commodity wholly intrastate in character and handling, *directly* burdens, obstructs or affects interstate commerce where the point of impingement of the intrastate transaction and the interstate transaction is *one of competition only.*

This contention presents a dangerous and revolutionary construction of the Commerce Clause of the Federal Constitution which would enable the Federal government to

control every enterprise, every occupation and every activity of the people merely by showing that the product thereof is in competition with similar products which cross state lines. Such a restriction would reach all enterprises and transactions which were in competition with those of other states. The authority of the Federal Government would embrace all activities of the people, and the authority of the State over its domestic affairs would exist only by sufferance of the Federal Government. There would be no limit to Federal power, and the States and the people would be effectively deprived of their rights theretofore reserved to themselves and guaranteed to them under Article X of the Amendments to the Constitution of the United States.[7]

The contention of petitioner, herein, is the result of wishful thinking of what power the Federal Government ought to have rather than what powers in fact have been given to it by the people. As was so aptly said by the Supreme Court in *United States* v. *Butler*, 297 U. S. 1, wherein certain provisions of the Agricultural Adjustment Act of 1933 were held to be in conflict with the Federal Constitution, at page 62:

> "The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. • • • *The question is not what power the federal Government ought to have but what powers in fact have been given by the people.* It hardly seems necessary to reiterate that ours is a dual form of government; that in every state there are two governments,—the state and the United States. Each State has all governmental powers save such as the people, by their Con-

[7] *Schechter* v. *United States*, 295 U. S. 495, 546
Carter v. *Carter Coal Co.*, 298 U. S. 238.

stitution, have conferred upon the United States, denied to the States, or reserved to themselves. The federal union is a government of delegated powers. It has only such as are expressly conferred upon it and such as are reasonably to be implied from those granted. In this respect we differ radically from nations where all legislative power, without restriction or limitation, is vested in a parliament or other legislative body subject to no restrictions except the discretion of its members." (Italics ours.)

We shall hereinafter show that petitioner's contention finds no support either in the provisions of the United States Constitution, the Acts of Congress or in the decisions of the Supreme Court of the United States.

A. The cases involving milk orders do not dispose of the constitutional and statutory questions raised for the first time by petitioner herein.

It is contended by petitioner that the identical question now urged was fully passed upon and considered in *United States* v. *Rock Royal Cooperative, Inc.*, 307 U. S. 533. An examination of the opinion in that case discloses that the question was not involved, and not even mooted. In that case suit was brought by the United States against a number of defendants seeking a mandatory injunction to compel them to comply with the provisions of the Order of the Secretary of Agriculture. The Commissioner of Agriculture and Market of the State of New York, intervened and sought an injunction commanding the defendants to comply with the Order issued pursuant to the New York State Laws in the event it should be determined that the milk was not subject to the Order of the Secretary of Agriculture of the United States. The Supreme Court, in discussing the Federal and State orders sought to be enforced, said at page 540:

"The two orders are in *pari materia*, one covering milk moving in or directly burdening, obstructing or affecting interstate commerce, and the other covering milk in intrastate commerce. *Each defendant is a dealer handling milk moving in interstate commerce.*" (Italics ours).

The Court further said at page 541:

"After a hearing, upon the merits the District Court dismissed the complaint. The State order was eliminated from consideration *on the understanding* not questioned here *that the milk of all four defendants is covered by the Federal order if valid.*" (Italics ours).

It is evident from the foregoing opinion that all the defendants by their own admissions and agreement entered of record, stipulated that they were subject to Federal control if said Act was valid.

Petitioner admits that the issue was not pressed in this court but contends that one of the defendants did challenge in the *lower court* the power of Congress to regulate it on the ground that its activities were entirely intrastate and that its milk was *usually* handled entirely intrastate. However, it is also admitted that the stipulation on which the case was tried showed that while the defendant's milk usually followed a route to New York City entirely within the State of New York, some of the tank trucks often passed through the State of New Jersey, en route to New York City, and that when tank trucks were not available the milk was shipped by rail on railroads running through the State of New Jersey.

The fact that pursuant to the stipulation of the parties, the State order was eliminated from consideration in this court, on appeal, clearly indicated that all of the defendants considered themselves subject to Federal control, if the order was valid.

This fact was fully recognized by the Supreme Court when it stated in its opinion, page 568:

> "There is no challenge to the fact that the milk of all four defendants reaches the marketing area through the channels of interstate commerce, nor is any question raised as to the power of Congress to regulate the distribution in the area of the wholly intrastate milk. It is recognized that the federal authority covers the sale of this milk as its marketing *is inextricably intermingled with and directly affects* the marketing in the area of the milk which moves across state lines." (Italics ours.)

It is evident from the foregoing that none of the defendants in that case in any wise challenged the fact that they were engaged in interstate commerce, nor did they raise any question as to the power of Congress to regulate the distribution in the area of wholly intrastate milk.

It further appears from the opinion that the intrastate milk referred to was *inextricably intermingled with milk which moved across state lines*, a fact which is not present in the case here under consideration.[8]

After careful examination of the opinion in *United States v. Rock Royal Co-operative, Inc.*, the United States Court

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[8] In the present case the court found that none of respondent's milk was physically intermingled with milk which had crossed state lines (R. 158) and that over 60% of the milk in the Chicago area was produced in Illinois, and the remaining milk sold in the Chicago marketing area was produced in Wisconsin, Indiana and Michigan (R. 158); whereas in the *Rock Royal* case two-thirds of the milk produced in the New York marketing area was found to have actually moved in interstate commerce and the remaining produced within the State of New York was physically and inextricably intermingled with the interstate milk. *U. S. v. Rock Royal Co-operative, Inc.*, 307 U. S. 533, 552-553.

of Appeals below held that this decision did not sustain petitioner's contention.[9]

Moreover the order promulgated by the Secretary of Agriculture under consideration in the *Rock Royal* case recognized that there was some milk entirely in intrastate commerce over which the Federal Government had no control and which was regulated by the order of the Commissioner of Agriculture and Market of the State of New York under State Laws and such intrastate handling of milk was expressly excepted from the order.

We submit that the *Rock Royal* case did not pass upon the question herein involved and that the expressions therein contained purporting to express a view upon the question here were not needful to the ascertainment to the questions between the parties and therefore *obiter dictum*. In the case of *Carroll* v. *Carroll*, 16 Howard (U. S.) 275, 14 L. Ed. 936, the Supreme Court said, in discussing the binding effect of an opinion rendered in a previous case, at p. 287:

> "To make it so, there must have been an application of the judicial mind to the precise question necessary

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[9] The Court said: "We are not convinced that the case sustains his position. The Supreme Court did not have before it the issue of the applicability of an order to a distributor whose activities were wholly intrastate. In that case the court said (p. 541): 'The state order was eliminated from consideration on the understanding, not questioned here, that the milk of all four defendants is covered by the Federal Order, if valid.' Further on in the opinion the court said (p. 568): 'There is no challenge to the fact that the milk of all four defendants reaches the marketing area through the channels of interstate commerce.' It is true that Mr. Justice Reed then said: 'Nor is any question raised as to the power of the Congress to regulate the distribution in the area of the wholly intrastate milk.' From this we believe the Supreme Court did not intend to preclude this important question, now before us, which was not an issue in the case before it." (R. 272).

> to be determined to fix the rights of the parties . . . and therefore this court and other courts organized under the common law has never held itself bound by any part of an opinion in any case which was not needful to the ascertainment of the right or title in questions between the parties."

In the case of *Cohens* v. *Virginia*, 6 Wheat. 399, 5 L. Ed. 257, when the case of *Marbury* v. *Madison*, 1 Cranch 137, 2 L. Ed. 60, was very earnestly pressed upon the attention of the court, Mr. Chief Justice Marshall said:

> "It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."[10]

It is contended by petitioner, that regardless of whether the court's remarks in the *Rock Royal* case were or were not *dictum*, the Circuit Court of Appeals, for the Second Circuit, in *United States* v. *Adler's Creamery, Inc.*, 107 Fed. (2d) 987, 110 Fed. (2d) 482, (certiorari denied 311 U. S. 657), had assumed that the *dictum* was not erroneous and correctly stated the law and had followed it.

However, the United States Circuit Court of Appeals, for the Seventh Circuit, in this case, after careful consid-

[10] To the same effect see *Williams* v. *U. S.*, 289 U. S. 553, 568.

eration of the *Adler's Creamery* case, refused to accept it as persuasive authority for petitioner's contention and pointed out that the court there relied upon the inopposite remark made in the *Rock Royal* case and *Currin* v. *Wallace*, 306 U. S. 1 and *Mulford* v. *Smith*, 307 U. S. 38, none of which supported petitioner's contention when applied to the respondent's activity in the case before this court (R. 27).

Petitioner also relies upon several decisions of District Judges, all of which, however, are easily distinguishable either upon the facts or the law.

In *U. S.* v. *Krechting*, 26 F. Supp. 266, the District Judge relied entirely upon *Nebbia* v. *New York*, 291 U. S. 502, to sustain his arbitrary finding that intrastate transactions involving milk necessarily affected and burdened interstate commerce. The Court entirely ignored the fact that the *Nebbia* case involved the right of a State under its police powers to legislate and did not involve the question of interstate commerce.[11] In this connection it may be noted that the Supreme Court has concurrently with the confirming opinion in the *Rock Royal* case sustained the power of the State to legislate in regard to the distribution of milk within the State.[12]

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[11] *Douglas* v. *Wallace*, 8 F. Supp. 379, 383

[12] In *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533, 570, the Court said: "The power of a State to fix the price of milk has been adjudicated by this Court. • • • It belongs to that category of commodities that for many years has been subjected to a regulatory power of the State." See also *Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S. 346, where the Court said (p. 351):

"Every State police statute necessarily will affect interstate commerce in some degree, but such statute does not run counter to the grant of Congressional power merely because it incidentally or indirectly involves or burdens interstate commerce."

In *United States* v. *Andrews*, 26 F. Supp. 123, relied upon by the petitioners, it appeared that the defendants were handlers of milk in the Boston area, who either produced or purchased milk from other producers in Massachusetts, and who also bought from other handlers who had received milk from producers outside of Massachusetts, the milk so purchased being *co-mingled* with the local milk and processed at their respective plants in Massachusetts. In view of these facts, not found in the case here under consideration, the Judge there granted a temporary injunction.

In *United States* v. *H. B. Hood & Sons*, 26 F. Supp. 672, three (3) defendants were involved, two (2) of them purchased their milk outside of the State and the third one did both an interstate and intrastate business. It claimed exemption as to the intrastate character of its activities which the Court denied on the basis of *Currin* v. *Wallace*, 306 U. S. 1, and the *Shreveport* case, 234 U. S. 342. It is evident that these facts differ materially from those here under consideration.

In *United States* v. *Schwarz*, Civil Action No. 1480, Northern District of Illinois, Judge Barnes, without formal opinion, followed the *dictum* in the *Rock Royal* case. It does not appear from the opinion to what extent the particular defendant was engaged in interstate activities.

It is respectfully submitted that it is evident from the foregoing that the question herein urged by the petitioner has not been passed upon by the Supreme Court. We shall hereinafter show that the decision of the District Court and of the United States Circuit Court of Appeals was correct and in accordance with the United States Constitution, the Acts of Congress and the decisions of the Supreme Court of the United States.

B. Congress may not under the commerce clause regulate purely intrastate transactions where the point of impingement of the intrastate transactions upon interstate transactions is one of competition only.

Petitioner assumes from the finding of the District Court to the effect that respondent's milk is sold "in competition with milk of other handlers in the area," that it amounts to a finding that respondent is in some wise guilty of unfair or illegal conduct which necessarily results in great harm and injury to his competitors which requires regulation by the Federal Government. Petitioner imports a sinister meaning to the word "competition", having undoubtedly in mind cases involving unfair practices, monopolies, boycotts, and similar actions generally condemned by the courts. We submit, however, that the word "competition" used in the ordinary and accepted sense, does not involve any illegal, fraudulent or unfair practice. Competition in trade has at all times under the law in this country been considered as the life of commerce and been encouraged, as evidenced by the anti-trust laws and similar enactments.

In *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540, 544, the Court said:

> "The law does not visit with its reprobation a fair competition in trade; its tendency is rather to discourage monopolies, except where protected by statute, and to build up new enterprises from which the public is likely to derive a benefit. If one person can by superior energy, by more extensive advertising, by selling a better or more attractive article, outbid another in popular favor, he has a perfect right to do so, nor is this right impaired by an open declaration of his intention to compete with the other in the market."

The fact that by lawful competition a person may lose some of his customers, does not create a cause of action in his favor for damages or other relief. In *Citizens' Light, etc., Co.* v. *Montgomery Light, etc., Co.*, 171 Fed. 553, 560, the Court recognized the settled common law that a trader, in order to get another man's customers, could use any means not involving violation of the criminal laws or amounting to "fraud, duress or intimidation" as the law understands and applies those terms to transactions between man and man. The Court said:

> "So long as what he does is done to benefit his own trade, and, in taking over the customers of another, he keeps within the limitations heretofore defined, he is safe from legal restraint at the instance of a competitor in following 'the law of competition,' which takes little note of the ordinary rules of good neighborhood or abstract morality. The person whose customers are thus taken from him cannot complain, for no right of action lies in his favor against him who solicited his customer, since the solicitor exercised a legal right in a legal way, and the exercise of a legal right in a legal way, for a lawful purpose, will not give a cause of action."

We agree with petitioner that we must assume that the District Court meant the word "competition" to have its ordinary significance and that it does not involve any intimation of illegality or unfair dealing on the part of the respondent herein, which is condemned by law.

Petitioner relies upon various affidavits in this case and exhibits offered at the hearing before the Secretary of Agriculture as tending to show that competition between handlers of intrastate and interstate milk is harmful. These affidavits and exhibits are based upon hearsay and abound in conclusions of law wholly unsupported by any competent

evidence. A motion to strike the affidavits was made by respondent in the Trial Court (R. 145-154) on that ground. The motion was partially heard and continued to a later date (R. 154). No formal order was entered thereon but presumably was considered by the court at the time petitioner's motion for summary judgment was denied.

Aside from the fact that there is no competent evidence in the record to support petitioner's contentions, we deem it unnecessary to enter into a discussion of economics, as it would not be material to the issues in this case. The question is whether Congress has the power under the commerce clause to regulate purely intrastate transactions solely on the ground that such intrastate transactions are in competition with interstate transactions or products thereof, *and not what power the Federal Government ought to have as a matter of convenience or necessity.*

In *United States* v. *Butler*, 297 U. S. 1, the Supreme Court said at p. 68:

> "From the accepted doctrine that the United States is a government of delegated powers, it follows that those not expressly granted, or reasonably to be implied from such as are conferred, are reserved to the states or to the people. To forestall any suggestion to the contrary, the Tenth Amendment was adopted.[13] The same proposition otherwise stated, is that powers not granted are prohibited. *None to regulate agricultural production is given, and therefore legislation by Congress for that purpose is forbidden.*

It is an established principle that the attainment of a prohibited end may not be accomplished under the

[13] "The Tenth Amendment declares: 'The Powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.' "

pretext of the exertion of powers which are granted. * * * Congress cannot render the pretext of executing delegated power, pass laws for the accomplishment of objects not intrusted to the Federal Government."

While Congress was authorized by the commerce clause of the Constitution [14] to regulate commerce among the several states, it did not authorize Congress under the guise of regulating interstate commerce between states to reach all enterprises and transactions which could be said to have an *indirect* effect upon the interstate commerce.

In *Schechter* v. *United States*, 295 U. S. 495, 546, the Supreme Court said:

"In determining how far the Federal Government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn *only as individual cases arise*, but the distinction is clear in principle. * * * *But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of State power.* If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the Federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the Federal Government. Indeed, on such a theory, even the development of the State's commercial facilities would be subject to Federal control. As we said in the Minnesota Rate Cases (*Simpson* v. *Shepard*), 230 U. S. 352, 410, 57 L. Ed. 1511, 1546, 33 S. Ct. 729, 48 L. R. A.

[14] Sec. 8, Article 1, Constitution of the United States.

(N. S.) 1151, Ann. Cas. 1916A, 18: 'In the intimacy of commercial relations, much that is done in the superintendence of local matters may have an indirect bearing upon interstate commerce. The development of local resources and the extension of local facilities may have a very important effect upon communities less favored and to an appreciable degree alter the course of trade. The freedom of local trade may stimulate interstate commerce, while restrictive measures within the police power of the State, enacted exclusively with respect to internal business, as distinguished from interstate traffic, may in their reflex or indirect influence diminish the latter and reduce the volume of articles transported into or out of the State.'" (Italics ours.)

Answering a similar argument of the Government in the *Schechter* case that if persons engaged in the poultry business in intrastate commerce were not made subject to the provisions of the Federal Code (N. R. A.), competition with those under the Code would suffer and that the cutting of prices would bring "about a demoralization of the price structure." The Supreme Court said at p. 549:

"Similar conditions may be adduced in relation to other businesses. *The argument of the Government proves too much.* If the Federal Government may determine the wages and hours of employes in the internal commerce of a State, because of their relation to cost and prices and their indirect effect upon interstate commerce, it would seem that a similar control might be exerted over other elements of cost, also affecting prices, such as the number of employes, rents, advertising, methods of doing business, etc. All the processes of production and distribution that enter into cost could likewise be controlled. If the cost of doing an intrastate business is in itself the permitted

object of Federal control, the extent of the regulation of cost would be a question of discretion and not of power." (Italics ours.)

A study of the decided cases construing the commerce clause reveals nothing to support petitioner's contention that a finding of competition with interstate handlers was sufficient to subject respondent to the order promulgated under the Agricultural Marketing Agreement Act of 1937 herein. All the cases relied upon by petitioner disclose that particular intrastate transactions were held subject to federal control *only* because they had a *direct* effect on interstate commerce and were closely co-mingled with and directly related to interstate commerce under facts entirely dissimilar from those here involved.

In the *Shreveport* case, 234 U. S. 342, as in *Railroad Commission of Wisconsin* v. *C. B. & Q. R. Co.*, 257 U. S. 563, the Court merely held that in dealing with common carriers who were engaged in *both interstate and intrastate commerce*, and involving *the same trains* serving *interstate* as well as *intrastate* transportation, Congress has the right to control their intrastate operations in order to prevent unjust discrimination in rates.

In *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, 41, relied upon by the petitioner, the Court held that "In view of the actual interstate dealings in cash sales of grain on the exchange, and the effect of the conduct of the sales in futures upon interstate commerce, we find no difficulty • • • in concluding that the Chicago Board of Trade is engaged in a business affected with a public national interest, and is subject to national regulation as such."

In *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 542, also relied upon by petitioner, the Court fully supports the position of Respondent herein and the decision is fully discussed by the lower court in its opinion. (R. 273). An examination of the opinion in the *Schechter*

case will disclose that the Supreme Court has not only distinguished most of the cases relied upon by petitioner herein, but effectively disposed of all of the contentions made by petitioner under this point. *We deem it conclusive of this case.*

In *National Labor Relations Board* v. *Jones and Laughlin Steel Corp.*, 301 U. S. 1, it appeared that the defendant received its raw materials in Pennsylvania from its subsidiary companies in other States, processed the raw materials in Pennsylvania and then transported them through its vast transportation facilities all over the country. The business of the defendant was likened to that of the stock yards in *Stafford* v. *Wallace*, 258 U. S. 495, and it was held that the activities of the defendant in effect constituted a stream or flow in interstate commerce which subjected the defendant to the *National Labor Relations Act*.

Currin v. *Wallace*, 306 U. S. 1; *Mulford* v. *Smith*, 307 U. S. 38, and *United States* v. *Darby*, 312 U. S. 100, also relied upon by petitioner, were fully distinguished by the United States Circuit Court of Appeals in its opinion (R. 272-273).

We submit, therefore, that the judgment herein does not conflict with the decisions relied upon by petitioner herein, but merely conforms to the well settled constitutional limitations of the power of Congress over intrastate matters. The scope of the power of Congress to control interstate commerce must be considered in the light of our dual system of government.[15]

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[15] See *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 548, where the Court said at p. 548: "While these decisions related to the application of the Federal statute, and not to its constitutional validity, the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system. Otherwise, as we have said, there would be virtually no limit to the Federal Power, and for all practical purposes we should have a completely centralized government."

Petitioner makes the claim that the existence of competition between interstate and intrastate commerce *such as in the case at bar*, has been regarded and treated as presenting the typical, as well as perhaps the simplest, situation to which the doctrine is applicable. In support thereof petitioner relies upon the *Shreveport* case, 234 U. S. 342, and the *Railroad Commission of Wisconsoin* v. *C. B. & Q. R. Co.*, case, 257 U. S. 563.

We submit there is no similarity between a railroad engaged *both* in interstate and intrastate business and that of the respondent herein, whose activities are entirely within the confines of one state. We believe the distinction is patent in view of the opinion in *Schechter* v. *United States*, 295 U. S. 495, 544, 556. Not regarding this fact, petitioner quotes an excerpt from the opinion in the *Schechter* case to prove that mere competition between domestic articles and those which crossed state lines, had a *direct* effect on interstate commerce, omitting, however, vital portions therefrom. The entire quotation is as follows, the portion omitted being shown by italics, page 546:

> "Direct effects are illustrated by the railroad cases we have cited as e. g., *the effect of failure to use prescribed safety appliances on railroads which are the highways of both interstate and intrastate commerce, causing injury to an employee engaged in interstate transportation by the negligence of an employee engaged in an intrastate movement*, the fixing of rates for intrastate transportation which unjustly discriminate against interstate commerce."

With regard to the railroad cases referred to the court had previously said at p. 544:

> "We have held that, in dealing with common carriers engaged in *both interstate and intrastate commerce*, the dominant authority of Congress necessarily embraces the right to control their intrastate opera-

tions in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to secure the freedom of that traffic from interference or unjust discrimination and to promote the efficiency of the interstate service." (Citing the *Shreveport* case and the *Railroad Commission* case relied on by petitioner.)

We submit that the competitive discrimination against interstate rates, as illustrated in the *Shreveport* case by a railroad engaged both in interstate and intrastate transportation, has no application whatsoever to a situation where a handler of milk buys all of his milk within a State and sells it within a State, and where none of his activities partake of an interstate character other than that his milk might be in competition with milk which crossed state lines. If petitioner's contention were correct, a local trucking company or interurban street car would be subject to federal regulation merely because they might compete with a railroad which was engaged in interstate commerce. There is hardly a single article produced or manufactured in common use which can be said not to be in competition with a similar article produced or manufactured across state lines.

Such transactions have only an *indirect* effect on interstate commerce. The quotation relied upon by petitioner from the dissenting opinion of Mr. Justice Cardozo in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 329, must likewise be considered in connection with the facts in that case. It appears from the dissenting opinion that each of the complainants were engaged both *in interstate and intrastate commerce* and that the principal business of each defendant was in interstate commerce, and therefore subject to Federal control on the principle announced in the *Shreveport* case and cited in the dissenting opinion. Mr. Justice Car-

dozo, however, recognized that the principle announced had no application to purely intrastate transactions where it does not *directly* or *intimately* affect interstate commerce.

Petitioner also relies upon *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, wherein the Court refused to construe the provisions of the Federal Trade Commission Act to read, "*Unfair methods* of competition in (interstate) commerce" as though it meant "unfair methods of competition in any way affecting interstate commerce," because Congress had not so provided and the Courts could only enforce the law as written. Petitioner contends that the statute involved in the present case contains language omitted from the *Federal Trade Commission Act*. In the Federal Trade Commission Act Congress sought to regulate unfair methods of *competition* in interstate commerce, whereas in the Agricultural Marketing Agreement Act of 1937, Congress sought to regulate the price of certain commodities in interstate commerce. In the former, "unfair competition" was the gist of the evil sought to be regulated; in the latter, the matter of "competition" was definitely eliminated as a determining factor as to whether the commodities were to be regulated or not when Congress, as we shall hereinafter show, intentionally deleted from the Act the words "in competition with" and re-enacted the Act with those words omitted.

We submit that not a single case decided by this Court has been cited by petitioner herein which holds that only *one factual* element is essential to subject a milk distributor whose operations are wholly intrastate in character to the Order, namely a showing that such milk distributor *competes* with handlers operating in the market whose milk had crossed state lines. The reason none can be found is evident. *The Constitution forbids it.* As the United States Circuit Court of Appeals so aptly said in its opinion in this case —"to do so would be to subscribe to a view of causation

which, as Mr. Justice Cardozo said in the *Schechter* case, *supra* p. 554, 'would obliterate the distinction between what is national and what is local in the activities of commerce.' " (R. 274).

Any other construction would enable Congress to control all of the activities of commerce to the exclusion of the States, based upon a mere showing that the local activities were in competition with interstate commerce.

The fact that Congress can not under the Constitution control purely local activities, like that of respondent herein, does not mean, as contended by petitioner that there is a hiatus where neither state nor nation could effectively function.

In this connection, it may be noted that the Supreme Court has concurrently with the confirming opinion in the *Rock Royal* case sustained the power of the State to legislate in regard to the distribution of milk within the State, and this power is recognized by the Supreme Court in *United States* v. *Rock Royal Co-Operative, Inc.*, 307 U. S. 533, 570, where the Court said:

> "The power of a State to fix the price of milk has been adjudicated by the Court. * * * It belongs to that category of commodities that for many years has been subjected to a regulatory power of the State." See *Nebbia* v. *New York*, 291 U. S. 502.

In *Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S. 346, 83 L. Ed. 752, the Supreme Court passed upon the validity of the Pennsylvania State law providing for the licensing and bonding of milk dealers and for the fixing of a minimum price to be paid to producers. The Court held that the Act as applied to a dealer operating a milk receiving plant within the State for shipments to points outside the State affected interstate commerce only inci-

dentally and, therefore, was not unconstitutional. The Court said (p. 351):

> "Every State police statute necessarily will affect interstate commerce in some degree, but such a statute does not run counter to the grant of congressional power merely because it incidentally or indirectly involves or burdens interstate commerce."

It is evident from the foregoing that the Federal Government has complete jurisdiction over interstate matters, while the States have complete control over intrastate transactions. Each is sovereign within its respective sphere. Theoretically, there is no hiatus between the powers granted to the United States and those retained by the states and the people. This can easily be demonstrated as a matter of arithmetic by subtracting from the whole, originally belonging to the States and the people, those powers thereafter granted to the Federal Government by the Constitution. The fact that in problems of present day economy, it may be desirable to have unified action between the Federal Government and the States does not in any wise change or affect the respective rights of the United States or of the States and the people.

We shall hereinafter show that Congress clearly recognized that the State would control agricultural commodities involved in intrastate transactions, and in order to secure uniformity in the formulation, administration and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, it enacted Section 10 (i).[16]

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[16] This Section provides that the Secretary of Agriculture, upon request of the duly constituted authorities of any State, is directed, in order to effect the declared policy and in order to obtain uniformity in the formulation, administration and enforcement of Federal and State programs relating to the regulation of the handling of agricul-

In the Committee reports of both the House and the Senate it was expressly pointed out in connection with the proposed amendment Section 10 (i) that:

> "Notwithstanding the authorization of cooperation contained in this section, there is nothing in it to *permit or require the Federal Government to invade the field of the States*, for the limitations of the act and the Constitution forbid regulation in that field, and this provision does not indicate the contrary * * *. Each sovereignty operates its own sphere. * * *" (R. 210). (Italics ours).

It will be seen that adequate facilities are provided by Congress for the full and complete cooperation between the States and the Secretary of Agriculture. If any State refuses to so cooperate, it is presumably by reason of the fact that the inhabitants of the State do not desire the State to do so for valid reasons, wholly sufficient to themselves. In such case it is evident that the Federal Government may not and should not invade the field of the States and impose upon the State and its citizens regulations against their will; any wishful thinking on the part of the Federal Government or its agencies to the contrary, notwithstanding.

C. Congress did not intend in passing the Agricultural Marketing Agreement Act of 1937, and prior Acts, to assume control of purely intrastate transactions and the Act itself contains no such provisions.

The brief history of the prior Acts which were incorporated to the Agricultural Marketing Agreement Act of 1937 and the interpretation and construction by the Courts of these Acts clearly sustains this position.

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tural commodities or products thereof to confer with and hold joint hearings with the duly constituted authorities of any State and is authorized to co-operate with such authorities and to issue complementary orders to orders or other regulations issued by such State authorities.

1. The Agricultural Adjustment Act of 1933 did not apply to transactions where the products were produced and sold within the same State (Title 7 U. S. C. A., Sec. 601, et seq.).

The Agricultural Adjustment Act of 1933, Sec. 608 (3) authorized the Secretary of Agriculture "to issue licenses permitting processors, associations of producers and others to engage in the handling *in the current of interstate or foreign commerce* of any agricultural commodity or product thereof *or any competing commodity or product thereof.*" (Italics ours.)

The Federal Courts, in construing said Act, uniformly held that a milk dealer purchasing all of his supply of milk in his state and selling all of said milk in said state was engaged in intrastate commerce and was not subject to the control of the Federal Government under said Act.[17]

On May 27, 1935, the Supreme Court unanimously rendered a decision in *Schechter* v. *United States*, 295 U. S. 495. In that case the court held that the slaughtering by wholesale poultry dealers of poultry shipped in the State and purchased by them from consignees, and the resale of the slaughtered poultry to retail dealers, are neither transactions in nor acts relating to interstate commerce so as to bring the regulation of hours and wages of employees of said wholesale dealers within the scope of the power conferred upon Congress by the Commerce Clause of the Federal Constitution.

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[17] *Douglas* v. *Wallace*, 8 F. Supp. 379, 381
United States v. *Greenwood Dairy Farms, Inc.*, 8 F. Supp. 398, 400
Royal Farms Dairy, Inc. v. *Wallace*, 8 F. Supp. 975 977, 979
Edgewater Dairy Company, Inc. v. *Wallace*, 7 F. Supp. 121, 122
Allen v. *Wallace*, 12 F. Supp. 515
Berdie v. *Kurtz*, 75 F. (2d) (C. C. A. 1935) 898.

The Supreme Court made a careful analysis of the decided cases and pointed out the distinction between direct and indirect effects upon interstate commerce and stated that the distinction of intrastate transactions upon interstate commerce held that the "distinction is clear in principle" and that it must be "recognized as a fundamental one essential to the maintenance of our constitutional system, otherwise * * * there would be virtually no limit to the federal power and for all practices we should have a completely centralized government."[18]

2. Congress, in 1935, in amending the Act of 1933, did not intend that the provisions shall apply to transactions where the products were produced and sold within the same State.

At the time the *Schechter* case was decided Congress was in session and immediately proceeded to amend the Agricultural Adjustment Act of 1933 to clarify doubtful legal provisions in view of the decision in the *Schechter* case. This is made evident by the report of the committee to the Senate on July 3, 1935, and the report of the committee to the House of Representatives on June 15, 1935 (R. 203, 204, 211) wherein it was stated that the amendments to the Agricultural Adjustment Act were needed in order to carry out two principal purposes, the second of which was "to insure that the program will be carried out within the limits of the powers given Congress under the Constitution." Both Senate and House reports provided, among other things:

> "The powers to be exercised under the proposed bill are confined within the limitations upon the Federal authority over interstate commerce as expressed by the Supreme Court in the *Schechter* case and other cases. (R. 207-211) * * *"

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[18] 295 U. S. 546, 548

"The scope of orders under the proposed section 8c is limited to the regulation of the handling of the specified commodities in the current of interstate or foreign commerce or to the handling thereof which directly burdens, obstructs or affects interstate or foreign commerce in such commodities or products thereof. Section 8 (2) of the Agricultural Adjustment Act now authorizes the Secretary of Agriculture to enter into marketing agreements with processors and others engaged in the handling of any agricultural commodity or product thereof *'in competition with'* interstate or foreign commerce. This phrase has been *omitted* from the proposed section 8c (1) of the bill which deals with orders, as well as from the proposed section 8b, which deals with marketing agreement, *because the proposed language makes it clear that the full extent of the Federal power over interstate and foreign commerce and no more is intended to be vested in the Secretary of Agriculture in connection with orders* (R. 207-208)" • • • (Italics ours.)

It will be noted that Congress intentionally omitted the phrase "in competition with" interstate or foreign commerce from the Marketing Agreement Act of 1935 in order that the full extent of the Federal power over interstate and foreign commerce *and no more* be vested in the Secretary of Agriculture in connection with orders. In other words, it definitely appears that Congress, following the *Schechter* case, intentionally omitted the phrase "in competition with," contained in the prior Act, in order that no product merely "in competition with" products in interstate or foreign commerce be deemed to come within the purview of the Marketing Agreement Act of 1935. This Act was subsequently in 1937 re-enacted as a part of the Agricultural Marketing Agreement Act of 1937 without change.

It therefore definitely appears that the contention herein made by petitioner that the mere fact that the milk handled by the respondent was "in competition with" other milk which crossed State lines, and therefore was within the purview and subject to the regulations of the Marketing Agreement Act of 1935, is contrary to the express intent of Congress as evidenced by the wilful and intentional omission of the phrase in the re-enacted Act herein under consideration.

That this was the deliberate intent of Congress is further evidenced by the debates in the Senate wherein it appears that those in charge of the Bill in the Senate emphasized and reiterated that the Bill was not intended to control any phase of the milk situation where the milk is produced and where it is sold within the same State and was passed with that express understanding.

The following are some of the excerpts:

"Mr. Tydings: In order to bring the example before the Senate in a concrete way, let us suppose milk is produced in a State and sold within that State.

"Mr. LaFollette: My interpretation would be that that would not fall in the classification of moving in interstate commerce, or flowing in interstate commerce, or directly burdening or obstructing interstate commerce.

* * *

"Mr. Tydings: In my judgment, however, Mr. President, if milk originates in the same State where it is sold, it is intrastate commerce, and the Federal Government has nothing to do with that particular shipment of milk. The Senator from *South Carolina* (*Mr. Smith*) and the Senator from Nebraska (Mr. Norris) and the Senator from Idaho (Mr. Borah), as well as I, all agreed the other day that *this was an interstate*

provision only, and I do not think that construction can be too greatly accentuated in this discussion, so that the Federal agency charged with administering this provision will not attempt to regulate intrastate shipments, when such shipments are not within the purview of the law.

"Mr. Borah: Mr. President, the language on page 10 'as directly burdens, obstructs, or affects interstate or foreign commerce,' is purely surplusage. It does not add anything whatever to the power of control by the Congress. It may be, that language having been used, that someone may assume it gives an additional control over intrastate commerce; but the court would have to determine for itself in each particular case whether intrastate commerce did directly affect or directly burden interstate commerce. In other words, the language herein, in my opinion, adds nothing whatever to the power of Congress.

* * *

"Mr. Tydings: I agree completely to what the Senator from Idaho has said. My only reason for restating the proposition is that if the Federal agency charged with the administration of this provision were to serve notice upon a producer of milk that the Federal Government had jurisdiction, the producer might be frightened into the belief that if he did not carry out the Government's order he might be fined or put in jail, or that something else might be done to him; *and I want it known by this debate, reiterated over and over again, that if the Congress passes this proposed act it is presumed that those who are charged with its administration will not, in the case of an intrastate shipment of milk, attempt to issue Federal orders and thereby cause producers to be put to the expense of hiring lawyers to prove that the Federal Government*

has no right to do the thing which it is attempting to do.

* * *

"Mr. Tydings: I may say to the Senator from Iowa that even if intrastate milk did become co-mingled with interstate milk, insofar as the man who produced and sold in the same State is concerned, that would not affect his situation. But here is the point: As we all know, the twilight zone, which the Senator from Wisconsin just described, offers an opportunity for the Federal Administrators to issue orders to State shippers and producers of milk where the whole transaction is within a State, which will force them to go to law in order not to be bound in cases by the Federal decree. *I want it distinctly understood that it is the sense of the Senate that those in charge of the administration of this provision will have no* right to issue orders which will take over the government or control or the price-fixing or any other phase of the milk situation where the milk is produced and where it is sold always within the same State.

"Mr. Dickinson: The very purpose of the 'weasel' words to which the Senator from Idaho has just referred is to do the very thing the Senator from Maryland has said should not be done.

"Mr. Tydings: I quite agree with the Senator, but I want it made clear *that the Senate does not interpret the provision in that way.* Insofar as I know, *no Senator upon this floor claims that the Federal Government has anything to do with milk which is produced and which* the proposed act will be enforced. * * *" (R. 215, 216). (Italics ours.)

Committee reports and explanatory statements of members in charge made in presenting the Bill for passage

may be regarded as an exposition of the legislative intent in a case where otherwise the meaning of the statute is obscure.

Duplex Printing Press Co. v. *Deering*, 254 U. S. 433, 475, 65 L. Ed. 349, 360.

Here, like in the *Duplex Printing Press Co.* case, it definitely appears that Mr. Smith, who submitted the committee report to the Senate and who had the bill in charge, had definitely agreed with the leading Senators that the Act was not intended to cover a situation where milk is produced in the State and sold within that State; that not a single Senator claimed otherwise; and that it was the sense of the Senate that the Government would have no right or control of any phase of the milk situation where the milk is produced and where it is sold within the same State. This was reiterated over and over again so that the real purpose could not be contortioned into a meaning which might authorize those in charge of the administration of the Act to include an intrastate handling of milk. This was the final word of the Senate on the subject and, borrowing the language from the opinion in the *Duplex Printing Press Company* case, 254 U. S. 443, 475

> "was uttered under such circumstances and with such impressive emphasis that it is not going too far to say that except for this exposition of the meaning of the section, it would not have been enacted in the form in which it was reported. In substantially that form, it became law, and since, in our opinion, its proper construction is entirely in accord with its purpose, as thus declared little need be added."

Petitioner in its brief calls attention to the fact that in the course of the debates in the Senate some of the Senators had expressed an opinion that under certain conditions intrastate commerce might be subject to the provisions of the Act, namely where it *directly* affects interstate com-

merce or where an interstate commodity was *so intermingled* with the intrastate commodities that it could not be separated and where no line of demarcation could be formulated.[19]

We respectfully submit that nothing said in that connection in any wise detracts from the unequivocal statement apparently fully agreed to by all the Senators to the effect that the Federal Government would have nothing to do with milk which is produced and which is sold in the same State, without which the Senate would not have passed the amendments. The question of intermingling intrastate with interstate milk so discussed is in no wise applicable to the case here under consideration since the problem of intermingling intrastate milk with milk which crossed state lines is not present in this case.

The debates in the House of Representatives were not offered in evidence. Petitioner, however, refers to a colloquy had by two of the Representatives in Congress wherein Representative Andresen was of the opinion that it would be a legal question as to whether or not milk that is sold by a farmer in Illinois to a handler within a marketing area would come within the provisions of the Act.[20]

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[19] 79 Congressional Record, 1135-1139.

[20] However, when asked by Mr. Halleck, "Do I understand that under the proposed amendment the issuance of orders is limited solely to interstate commerce?" Mr. Andresen said: "Absolutely; it does not affect intrastate commerce. If the gentleman is asked when he gets back home by his grocery merchant who sells milk, butter and cheese, whether or not the merchant has to take out a license, he may tell him 'no' he does not have to take out a license and does not become subject to the federal license issued by the Secretary of Agriculture. The same thing would apply to the small *milk dealer* or a farmer who has a small herd of cattle and *sells* milk to the people in the cities and villages *in the district*. He would not be subject to a license because the license provisions or order provisions deal only with the commodities that move in interstate commerce." 79 Congressional Record, 9479. (Italics ours).

In view of the committee report of the House of Representatives, which was identical with that of the report of the committee of the Senate (R. 203, 204, 211), it was evidently the intention of the House of Representatives to limit the scope of the Act and of the orders promulgated thereunder to the limitations upon the federal authority over interstate commerce as expressed by the Supreme Court in the *Schechter* case. The opinion in the *Schechter* case was deemed so important that it was by unanimous consent inserted in the Congressional Record[21] and thereby became the yardstick to be used in connection with the interpretation of said Act.

3. The provisions of the Agricultural Adjustment Act of 1935 do not apply to transactions where the products were produced and sold in the same State.

An examination of the provisions of the Act clearly shows that its provisions have no application to the respondent, who is admittedly engaged solely in intrastate business. The mere fact that the products respondent handles may be in competition with like products which cross State lines does not make it subject to the Act.

In Section 8b of said Act, relating to Marketing Agreements, it is expressly provided that the Secretary shall have power to enter into marketing agreements with processors, producers and others engaged in the handling of any agricultural commodity or product thereof *only* with respect to such handling as is in the current of interstate or foreign commerce, or which *directly* burdens, obstructs, or affects interstate or foreign commerce in such commodity or product thereof.

In Section 8c(1), the Secretary of Agriculture is authorized, subject to the provisions of said section, to issue and amend orders, and it is expressly provided that:

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[21] 79 Congressional Record, p. 8245.

"such orders shall regulate in the manner hereinafter in this section provided *only* such handling of such agricultural commodity or product thereof as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects interstate or foreign commerce in such commodity or product thereof."

We submit that Congress, by the use of the word "only" in the foregoing sections, clearly emphasized its determination that the Secretary of Agriculture was limited in the making of marketing agreements or issuing orders to such handling of products which actually were in the current of interstate or foreign commerce, or which *directly* burdened, obstructed or affected interstate or foreign commerce, but did not authorize the Secretary of Agriculture to interfere with or exercise any jurisdiction over purely intrastate matters.

In *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 80 L. Ed. 1160, the Supreme Court, in an extensive opinion, reviews the entire history of decisions involved in the interpretation of the so-called Commerce Clause of the Constitution. The Court held that the fact that the commodities purchased and manufactured within the State are intended to be sold or transported outside the State did not render their production or manufacture subject to Federal regulation under the Commerce Clause.

The Court there held that the fact the commodities purchased or manufactured within a State, are intended to be sold or transported outside the State did not render their production or manufacture subject to Federal regulation under the Commerce Clause. Quoting from *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245, 259, 67 L. Ed. 237, 243, the Court said:

"To hold otherwise 'would nationalize all industries, it would nationalize and withdraw from state jurisdic-

tion and deliver to federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts and the woolen industries of other States, at the very inception of their production or growth, that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof,' wool yet unshorn, and coal yet unmined, because they are in varying percentages destined for and surely to be exported to States other than those of their production.' "

In discussing the contention of the Government that the production and distribution of bituminous coal bears upon and directly affects interstate commerce, and that regulation thereof is imperative for the protection of such commerce, the Supreme Court said, page 307:

"That the production of every commodity intended for interstate sale and transportation has some effect upon interstate commerce may be, if it has not already been, freely granted; and we are brought to the final and decisive inquiry, whether here that effect is direct, *as the 'preamble' recites*, or indirect. The distinction is not formal, but substantial in the highest degree, as we pointed out in the *Schechter* Case, *supra*, pp. 546 *et seq.* * * *

"Much stress is put upon the evils which come from the struggle between employers and employees over the matter of wages, working conditions, the right of collective bargaining, etc., and the resulting strikes, curtailment and irregularity of production and effect on prices; and it is insisted that interstate commerce is *greatly* affected thereby. But, in addition to what has just been said, the conclusive answer is that the evils are all local evils over which the federal government has no legislative control. * * * Such effect

as they may have upon commerce, however extensive it may be, is secondary and indirect. An increase in the greatness of the effect adds to its importance. It does not alter its character. * * *

"The federal regulatory power ceases when interstate commercial intercourse ends; and, correlatively, the power does not attach until interstate commercial intercourse begins." (Italics ours.)

4. The Marketing Agreement Act of 1937 re-enacted all the provisions of the Agricultural Adjustment Act of 1933 and 1935, and its provisions do not apply to transactions where the product was produced and sold within the same State.

It is evident from the foregoing that it was the settled law in 1937 that the Commerce Clause could not be construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, and that the effect must be a *direct* effect upon interstate commerce before the Federal government may take jurisdiction.

In 1937 Congress reenacted and amended certain provisions of the Agricultural Adjustment Act (Act of May 12, 1933, 48 Stat. at L. 31, Chap. 25, as amended Aug. 24, 1935, 49 Stat. at L. 750, Chap. 641, 7 U. S. C. A., Sec. 602). All of the sections pertaining to interstate commerce were reenacted.

Sections 4 and 5 of the Agricultural Marketing Agreement Act of 1937 expressly approves and legalizes all marketing agreement, license, order or regulation under the Agricultural Adjustment Act, or any amendment thereof, and further provides that except for the processing taxes or compensating taxes, which were omitted by the Act of 1937, nothing in said Act was to be construed as affecting the

provisions of the Agricultural Adjustment Act, as amended, other than those enumerated in Section 1. Said Section 1 has no application to the interstate commerce question.

Section 10(j), defining interstate or foreign commerce, was added to the Act of 1935.[22]

Said section clearly follows the *Schechter* and the *Carter* cases as to what constitutes "interstate commerce" and does not in any wise attempt to change the settled law. It is evident that the milk purchased by the defendant from farmers in the State of Illinois and which is sold within the State of Illinois does not come within the statutory definition of what constitutes interstate or foreign commerce. The petitioner herein admits that the respondent was engaged purely in an intrastate transaction, and it is not claimed that the milk handled by the respondent is in

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[22] "10(j) The term 'interstate or foreign commerce' means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory or possession, or the District of Columbia. For the purpose of this Act (but in nowise limiting the foregoing definition) a marketing transaction in respect to an agricultural commodity or the product thereof shall be considered in interstate or foreign commerce if such commodity or product is part of that current of interstate or foreign commerce usual in the handling of the commodity or product whereby they, or either of them, are sent from one State to end their transit, after purchase, in another, including all cases where purchase or sale is either for shipment to another State or for the processing within the State and the shipment outside the State of the products so processed. Agricultural commodities or products thereof normally in such current of interstate or foreign commerce shall not be considered out of such current through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act. As used herein, the word 'State' includes Territory, the District of Columbia, possession of the United States and foreign nations."

the current of interstate commerce or that it is in any wise commingled with milk which has crossed State lines. We find nothing in the definition which in any wise supports petitioner's theory that merely because respondent's milk is in *competition* with other milk which had crossed State lines, respondent was engaged or in any wise interfered with or obstructed interstate commerce. Congress still retained the provision in the Act that its provisions shall apply *only* to the handling of agricultural commodities as is in the current of interstate or foreign commerce or which *directly* burdens, obstructs or affects interstate or foreign commerce in such commodity.

We have shown that Congress in enacting the Agricultural Marketing Agreement Act of 1937 and re-enacting the provisions of prior Acts never intended that the Act should include a situation like the one here under consideration where a handler of milk purchases all of its milk from farmers in the State of Illinois and, without in any wise commingling the same with others, sells it entirely within the State of Illinois, although in competition with other milk which may have crossed State lines.

We have also shown that the provisions of the Act expressly limit the Secretary of Agriculture to the promulgation of orders to the regulation of such handlers *only* who are in the current of interstate or foreign commerce, or which directly burden, obstruct or affect interstate or foreign commerce in such commodity, and that under the *Schechter* case and other cases handling of milk by the defendant did not directly affect interstate commerce.

5: The business of an intrastate handler of milk under the Marketing Agreement Act of 1937 does not directly affect interstate commerce merely because his product competes with interstate handlers.

We have shown that Congress expressly amended the law to avoid such construction by omitting the phrase "in competition with."

Where a revised statute, or one enacted for another, *omits* provisions contained in the original Act, the parts omitted cannot be kept in force *by construction* but are annulled. In *United States* v. *Stroop*, 109 F. (2nd) 891 (C. C. A. Ohio, (1940)), the Court said (p. 893):

> "The Congress must be presumed to know the language employed in former acts and the judicial construction placed upon them, and if in subsequent legislation on the same subject, different language is used, there is a presumption of a manifest intention to change the law. *Johnson* v. *United States*, 225 U. S. 406, 416, 56 L. Ed. 1142."

To the same effect, see *United States* v. *Board of Commissioners*, 26 F. Supp. 270, 274; *Stewart* v. *Kahn*, 78 U. S. 493; 20 L. Ed. 176, 178.

It follows that the Courts must, in order to give effect to the declared intent of Congress, construe the Act to mean that mere *competition* by an intrastate handler with similar products crossing State lines does not subject the handler to Federal regulation.

We contend that in view of the settled law so ably set forth in the *Schechter case*, 295 U. S. 531, which Congress, as shown by the House and Senate reports, intended to follow, and which was reiterated in the *Carter* case, 298 U. S. 238, Congress had no power to control all local enterprises under the pretext that it had an indirect effect

on interstate commerce merely because one was in competition with the other or that prices of the products in the industry might be affected.

This is the crux of this case and was aptly summed up by the United States Court of Appeals in its opinion in the case below when it said: (R. 273)

> "In *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, 520, 548, the unreversed findings of the Circuit Court of Appeals, 76 F. (2) 617-618, were that 96% of the chickens involved under the particular code came from interstate commerce to be disposed of in New York; that the practice sought to be regulated not only demoralized the business in New York, but had national repercussions affecting and controlling the prices received by those engaged in interstate commerce. Under such circumstances the court held that the effect upon interstate commerce was only an indirect one and not sufficient to permit Congressional regulation. The effect upon commerce in the case now before us is no more direct than in the *Schechter* case. The only substantial difference is that in the present case none of the defendant's milk was ever in interstate commerce. The milk's only possible relation to interstate commerce was with some thirty-odd per cent of the milk in the area which had been brought into the state, processed, and then sold in competition with defendant's." (Italics ours.)

Had Congress intended that mere competition with interstate products shall subject a purely intrastate enterprise to Federal regulation, it could and would have said so in plain, unmistakable terms and not purposely omitted the same by a later amendment.

Not having done so, the Courts cannot legislate for Congress and read into the law something which Congress itself

did not include and as a matter of fact expressly intended to exclude.

In *Federal Trade Commission* v. *Bunte Bros., Inc.*, 312 U. S. 349, 85 L. Ed. 531 [1941], affirming the United States Circuit Court of Appeals of this Circuit, said (p. 534):

> "This case presents the narrow question of what Congress *did, not what it could do.* And we merely hold that to read 'unfair methods of competition in (interstate) commerce' as though it meant 'unfair methods of competition in any way affecting interstate commerce,' requires, in view of all the relevant considerations, much clearer manifestation of intention than Congress has furnished." (Italics ours.)

The maxim, *expressio unius est exclusio alterius*—the expression of one thing is the exclusion of another, is clearly applicable. Congress having specified that only such handling of agricultural commodities which *directly* burdens, obstructs or affects interstate or foreign commerce in such commodity shall be subject to the provisions of the Act, it follows that competition with interstate products which are *indirect* burdens or obstructions on interstate or foreign commerce as intended by Congress shall not be subject to the Act.[23]

Any construction as herein contended for by petitioner will definitely preclude the State of its jurisdiction in intrastate affairs entirely upon the pretext that the local transactions in some way, no matter how infinitesimal, or merely by being in competition with like products crossing State lines, affected interstate commerce and therefore were entirely within the control of the Federal government under the Interstate Commerce Clause.

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[23] *Arthur* v. *Cumming*, 91 U. S. 362, 364, 23 L. Ed. 438.

We submit that such a construction would do violence to the Constitution—violence to the express intent of Congress—violence to the express language used in the Act of Congress, and would constitute an usurpation by the Courts of the legislative branch of the government by construction which in effect is new legislation.

6. The finding of the Secretary that all milk which was produced for sale in the marketing area is handled in the current of interstate commerce, or so as directly to burden, obstruct or affect interstate commerce, is not authorized by law, contrary to the fact, and of no legal effect.

Petitioner contended that the Secretary's finding contained in Sec. 941.0(1) of the order brings the respondent's business within the regulatory scope of the order.

As heretofore shown, Congress itself has made no such finding in the Act. If anything, in view of the history of the Act and the express intent of Congress, such interpretation of the law is clearly prohibited.

No authority to make such finding was delegated to the Secretary by the Act. Hence such finding is of no legal effect.

As was so aptly said in *Douglas* v. *Wallace*, 8 F. Supp. 379, 383:

> "The mere statement or finding either by Congress, the Secretary of Agriculture, or the Administrator, that the production and sale of milk in the Oklahoma City area is a burden upon interstate commerce, is not only not conclusive, but is not justified by the facts. To conclude that such transactions constitute interestate commerce is equivalent to the conclusion that all commerce is interstate."

Even if the Congress had specifically authorized the Secretary to make such finding, which it did not, such

finding would not be conclusive because the question is clearly one for final judicial determination.

St. Joseph Stock Yards Co. v. *United States*, 298 U. S. 38, 51;

Royal Farms Dairy, Inc. v. *Wallace*, 8 F. Supp. 975, 977.

Even if the Act itself had recited that competition of intrastate commodities with interstate products shall be deemed to have a direct effect on interstate commerce, nevertheless such recital would not be conclusive upon the courts.[24]

The cases relied upon by the petitioner in support of its contention are easily distinguishable from the case here under consideration, firstly, because Congress itself made no such finding in the Act nor delegated such authority to the Secretary, and secondly, the facts in each of the cases differ materially from those here involved. Here the relation of the subject to interstate commerce and its effect upon it, as heretofore shown, are clearly nonexistent.

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[24] In *Carter* v. *Carter Coal Co.*, 298 U. S. 238, the Act, there considered, in its preamble recited that direct effect upon interstate commerce, but the court did not feel bound thereby and made its own finding saying (p. 307)

> "* * * and we are brought to the final and decisive inquiry, whether here that effect is direct, *as the 'preamble'* recites, or indirect."

II.

Petitioner is precluded from urging that the Court had no jurisdiction to issue an injunction against the United States, having failed to urge this point in the lower courts. The injunction was nevertheless properly granted.

It is contended by petitioner that the District Court had no jurisdiction to issue an injunction against the United States. This question was only incidentally mentioned by petitioner in a foot-note to its petition for a writ of *certiorari* (p. 2) under the heading "Question Presented", but was not specifically mentioned or argued either in the District Court[25] or in the United States Court of Appeals.[26]

A question not urged in the lower court or in the Circuit Court of Appeals will not be considered by the Supreme Court.

Adams v. *Mills*, 286 U. S. 397, 416, 417.
Zellerbach Paper Company v. *Helvering*, 293 U. S. 172, 182.
Sonzinsky v. *United States*, 300 U. S. 506, 514.

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[25] See argument of counsel for petitioner (R. 161-163) and argument of counsel for respondent (R. 195-197) on motion to dismiss counterclaim.

[26] Petitioner, in its brief (p. 23) in the United States Court of Appeals, urged the following as the contested issues: (a) Whether plaintiff was entitled to summary judgment on its motion under Rule 56 of the Federal Rules of Civil Procedure; (b) Whether the plaintiff was entitled to judgment in its favor on the final hearing; (c) Whether the District Court committed prejudicial error in striking defendant's fourth to eleventh defenses, inclusive. The question, now for the first time urged, was not suggested or argued in the brief and the United States Court of Appeals was not asked and did not pass upon the question of jurisdiction.

Should this Court nevertheless consider the proposition, we submit that the District Court had the right to grant an injunction.

Jurisdiction of suits against the United States is granted by the Tucker Act of March 3, 1887, as amended, 28 U. S. C. A. 41 (20).[27]

While the action was brought by the petitioner in the name of United States of America, the fact is that it was instituted on behalf of and at the request of the Secretary of Agriculture of the United States.[28] The object of the counterclaim was to restrain the Secretary of Agriculture and governmental agencies from enforcing Order No. 41 against the respondent, which, it was alleged, was illegal and contrary to the law and did not apply to the defendant, the enforcement of which would result in great and irreparable damage to the respondent in compelling it to comply with said order and paying sums of money to

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[27] Said Tucker Act provides "that the district courts shall have original jurisdiction as follows":

> Twentieth. Concurrent with the Court of Claims of all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admirality, if the United States were suable, *and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the* Government of the United States against any claimant, *against the Government in said court* . . ." (Italics ours.)

[28] See complaint (R. 2).

others who were not legally entitled thereto (R. 100). Under such circumstances injunction is a proper remedy.

Panama Ref. Co. v. *Ryan*, 293 U. S. 388, 433.
Waite v. *Macy*, 246 U. S. 606, 610.
Philadelphia Company v. *Stimson*, 223 U. S. 605, 622.
Colorado v. *Toll*, 268 U. S. 228, 230.
Lane v. *Watts*, 234 U. S. 525, 540.

The procedure adopted by the respondent in this case in filing a counterclaim conforms to a practice commonly used in similar cases for many years.[29]

The cases relied upon by petitioner to the effect that "a claim that would not constitute a cause of action against the sovereign cannot be asserted as a counterclaim",[30] have no application to the cause herein under consideration.

In the *Shaw* case it was held that the United States, by filing a claim against an estate in a State Court, did not subject itself in accordance with the local statutory

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[29] For example, there were many cases instituted under the Agricultural Adjustment Act of 1933 wherein both plaintiff and the defendant, under counterclaims, sought injunctions against each other, and injunctions were granted in favor of the party opposing the United States, and the injunctions on behalf of the United States were denied.

United States v. *Greenwood Dairy Farms*, 8 F. Supp. 398.
Royal Farms Dairy Company v. *Wallace*, 8 F. Supp. 975.
Edgewater Dairy v. *Wallace*, 7 F. Supp. 121.
Columbus Milk Producers v. *Wallace*, 8 F. Supp. 1014.

[30] *United States* v. *Shaw*, 309 U. S. 495.
United States v. *The Thekla*, 266 U. S. 328.
Nassau Smelting & Refining Works v. *United States*, 266 U. S. 101.

practice to a counterclaim or set-off, there being no provision in the law authorizing such procedure. The Court, in its opinion, however calls attention to the fact that under the Tucker Act the claims against the United States may be sued upon in the Court of Claims or the District Court.[31]

In the *Nassau Smelting & Refining Works* case relied upon by petitioner, the Court merely held that since the defendant's claims were based exclusively on the Dent Act,[32] the counterclaim was improper and could not be asserted in the District Court as the Tucker Act did not apply since the Dent Act conferred exclusive jurisdiction upon the Court of Claims.

Rule 13(d) of the Federal Rules of Civil Procedure expressly provides for the assertion of counterclaims against the United States, or an officer or agency thereof, where authorized by law.

We submit that the District Court had jurisdiction to entertain the counterclaim.

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[31] 309 U. S. 501.

[32] March 2, 1919, Chap. 94, (40 Stat. at L. 1272).

PART TWO.

I.

The District Court erred in finding contrary to the law and the evidence that the Order was issued by the Secretary in full compliance with the law and that all conditions precedent to the effectiveness of said Order have occurred.

It is fundamental that any order issued by the Secretary of Agriculture must conform to the provisions of the Act and all conditions precedent to the effectiveness of said order must have occurred.

The Supreme Court, in *H. P. Hood & Sons* v. *United States*, 307 U. S. 588, 598, states the proposition concisely as follows:

> "The question is simply whether the statute was followed."

We shall show that the Secretary of Agriculture not only failed to comply with conditions precedent to the effectiveness of said order but that the order as promulgated is contrary to the express provisions of the Act.

1. The Secretary of Agriculture did not give due notice of and opportunity for a hearing upon Order No. 41, herein sought to be enforced.

The Act expressly requires the Secretary of Agriculture to give due notice of and an opportunity for a hearing upon

a particular proposed order and this requirement is made a condition precedent to the effectiveness of an order.[33]

The respondent introduced at the hearing of said cause respondent's exhibits 1, 2, 3 and 4, which are admitted by the petitioner to constitute *all* of the evidence upon which the Secretary of Agriculture made his findings and fixed the terms and provisions containing the order (Appellant's Br. below, p. 21; Tr. 201).

An examination of respondent's exhibits 1, 2, 3 and 4 discloses that the Secretary of Agriculture gave notice of a public hearing on June 9, 1939 regarding the proposed marketing agreement and order regulating the

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[33] Section 8c(3) of the Agricultural Marketing Agreement Act of 1937 provides: "* * * he *shall give due notice of and an opportunity for a hearing upon a proposed order.*"

Section 8c(4) provides: "*After such notice and opportunity for hearing,* the Secretary of Agriculture shall issue an order, if he *find* and *sets forth in such order,* upon the evidence introduced *at such hearing* (*in addition to such other findings as may be specifically required by this section*) *that* * * *."

Section 8c(9) provides: "Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers * * * to sign a marketing agreement relating to such commodity or product thereof, *on which a hearing has been held,* the Secretary of Agriculture, with the approval of the President, determines: * * *."

Section 8c(10) provides: "*No order shall be issued* under this section *unless* it regulates the handling of the commodity or product covered thereby in the same manner as and is made applicable *only to persons* in the respective classes in the industrial or commercial activity specified in, a marketing agreement *upon which a hearing has been held.*"

Section 8c(17) requires "that notice of a hearing upon a proposed amendment to any order issued pursuant to Section 8c, *given not less than three days* prior to the date fixed for such hearing, shall be deemed notice thereof." (Italics ours.)

handling of milk in the so-called "Chicago, Illinois Marketing Area", *prepared and proposed by the Pure Milk Association and the Chicago Milk Producers Council, Inc.* This proposed marketing agreement and order provided that the so-called "Chicago, Illinois Marketing Area" was to include all that territory lying within the limits of Chicago, Illinois and all that territory lying within the boundaries of Cook County, Du Page County, State of Illinois, and townships of Wheaton, Du Page, Plainfield, Lockport, Homer, Troy, New Lenox, Frankfort, and Crete, in Will County, in the State of Illinois, and the townships of St. John, Ross, North Calumet, and Hobart, in Lake County, in the State of Indiana (Appendix, p. i).[34]

A public hearing was held on June 26, 1939 pursuant to a notice issued by the Secretary of Agriculture "on the marketing agreement and order prepared and proposed by said Pure Milk Association and the Chicago Milk Producers, Inc." (Defts.' Ex. 3, pp. 3, 5). All of the evidence taken at the hearing was with respect to the proposed marketing agreement and the proposed Chicago marketing area as therein defined (Defts.' Exs. 1, 2, 3 and 4).

No action was taken by the Secretary of Agriculture with respect to the proposed marketing agreement of the Pure Milk Association and the Chicago Milk Producers' Council, Inc.

On August 18, 1939 the Secretary of Agriculture tentatively approved *another* marketing agreement regulating the handling of milk in a different so-called "Chicago, Illinois Marketing Area" (R. 63) containing substantially the same provisions as Order No. 41 involved herein (R.

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[34] Excerpts of respondent's exhibits 1, 2, 3 and 4 are set forth in an appendix to this brief.

64-76), but *differing* materially in substance from that proposed and on which hearings were had (Appendix, p. i-x).

The Chicago, Illinois marketing area in Order No. 41 covers only the territory within the corporate limits only of the cities of Chicago, Evanston, Wilmette, Kenilworth, Winnetka and Glencoe, State of Illinois (R. 11).

Other material differences appear such as in the Definition of Producers and Handlers (contrary to Section 8c(10) (supra)), Reports of Handlers, Classification of Milk, Minimum Prices, Sales Outside the Marketing Area, Application of Provisions, Determination of Uniform Prices to Producers, Payment for Milk, Expenses of Administration, and many other provisions contained in the one are omitted in the other. (Compare Order No. 41 (R. 8-22) and proposed marketing agreement prepared by Pure Milk Association, et al) (Appendix, p. i-x).

No hearing was had with respect to the tentatively approved marketing agreement. No notice or opportunity for a hearing was given by the Secretary of Agriculture to the producers or handlers of the product.

The tentative marketing agreement, or Order No. 41, was not submitted to the handlers engaged in the City of Chicago for signature. Only certain of the producers were thereupon requested by the Secretary's representative to participate in the referendum, and Order No. 41 was thereafter issued by the Secretary of Agriculture (R. 221, 228).

It is evident from the foregoing that a hearing was had upon the proposed marketing agreement prepared by the Pure Milk Association and the Chicago Milk Producers Council, Inc., but not upon the tentatively approved marketing agreement and proposed order submitted to the producers in referendum (Appendix i, Tr. 63-67).

A comparison of the marketing agreement upon which a hearing has been held, and the marketing agreement submitted to the producers in referendum, as incorporated in Order No. 41, discloses such a diversity of provisions that it cannot be said that the hearing upon the former was also a hearing upon the latter. We have already adverted to the material differences in the so-called "Chicago marketing area" and in the proposed plan and Order No. 41. The producers involved in the so-called "Chicago, Illinois Marketing Area" under the plan, on which a hearing was had, included not only the City of Chicago, but all of the territory lying within the boundaries of Cook County and Du Page County, in the State of Illinois, various townships in Will County, and various townships in the State of Indiana.

The testimony introduced at the hearing was in reference to this proposed "Chicago, Illinois Marketing Area" and involved numerous producers and handlers of milk in no wise affected by Order No. 41. The facts involved in determining the desirability of creating a marketing agreement with reference to the so-called "Chicago Marketing Area", as defined in Order No. 41, differed materially from the facts involved in the proposed plan submitted by the Pure Milk Association, *et al.* upon which no hearing was had.

The producers and handlers of milk and the public had no opportunity to be heard on the new and wholly different order promulgated by the Secretary. The Act clearly contemplates that a hearing must be held before any order issued pursuant to the Act shall become effective (Sec. 8c(9)).

Petitioner admits that the proposal on which the hearing was held, the tentatively approved marketing agreement and the order differed, but that the general scheme or the manner of regulation is the same in each, in that

"each provides minimum classified prices which handlers are required to pay for milk purchased from producers, and each provides for distributing the returns from the classified prices to all producers through a market-wide equalization pool, and that the proposal, the marketing agreement and the order are all applicable to persons engaged in precisely the same class of industrial or commercial activity, *i. e.*, the handling of milk."

While this statement is correct as far as it goes, the fallacy thereof is apparent.

Every order promulgated by the Secretary of Agriculture under the Act, whether in New York, Boston, Omaha or Duluth, can be said to embody the same general scheme or manner of regulation. Yet, it can hardly be contended that a hearing held upon a proposed marketing agreement or order covering for example the New York area, could be considered as in compliance with the Act by the Secretary in the promulgation of an order embodying the general scheme and applicable to handlers of milk, but designating a new and different marketing area in another city, such as Chicago or elsewhere, under entirely different circumstances, terms and conditions.

The differences between the proposed marketing agreement and order as issued, are not trivial or immaterial, as petitioner seeks this court now to believe. No one will contend that the questions involved in determining the necessity or advisability of creating a marketing area covering two entire counties and thirteen townships located in other counties in the States of Illinois and Indiana, are the same as are involved in determining the desirability of creating a marketing area within the confines of the City of Chicago and several adjoining cities and villages, all located in a part of one county in Illinois.

Producers and handlers notified to appear on the hearing of the proposed marketing agreement had the right

to assume that the questions involved and to be considered at the hearing, would be those which concerned the proposed plan of marketing as therein defined and set forth. All of the evidence introduced at this hearing contemplated the consideration of an economic problem in which producers selling milk and handlers disposing of milk in both Illinois and Indiana were interested. An entirely different problem, however, was for the first time presented when the Secretary of Agriculture submitted to certain producers only, for referendum, his newly conceived tentative order which changed the marketing area and materially altered the definitions of producers and handlers and other provisions of the proposed marketing agreement. He thereby altered not only the number and classification of people which would have been affected under the original plan and the economic problems involved, but also created new controversial questions not theretofore in any wise in issue or considered at the prior hearing.

We submit that there actually was no hearing upon the proposed order of the Secretary of Agriculture submitted to some of the producers in referendum.

Under Section 8c(4), the Secretary of Agriculture was authorized to issue an order if he finds from the evidence introduced at such hearing that the issuance of such order will tend to effectuate the declared policy of the Act with respect to such commodity. Since the evidence introduced at the hearing pertained to an entirely different plan, it follows that the Secretary of Agriculture had no authority to issue an order upon which no evidence was introduced and which was not even under consideration when the hearings were held.

We therefore submit that the order never became effective because the conditions precedent to its effectiveness never occurred.

2. Order No. 41 never became legally effective because the required approval of producers was never properly secured.

Section 8c(9) of said Act expressly provides:

> "Any order issued pursuant to this section shall *become effective in the event that*, the Secretary of Agriculture, with the approval of the President, determines: * * * B. * * * is approved or favored.
>
> (i) By at least two-thirds of the producers * * *"

Section 8c(19) of the Act provides:

> "For the purpose of ascertaining whether the issuance of an order is approved or favored by producers *as required under the applicable provisions of this title*, the Secretary may conduct a referendum among producers. The *requirements* of approval or favor under any such provision *shall be held to be complied* with *if*, of the total number of producers, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring *is equal to or in excess* of the percentage *required under such provisions.* * * *". (Italics ours.)

Petitioner contended that the Secretary's determination as to producers' approval of an order is a matter of executive judgment and discretion which cannot be controlled or set aside by the Courts.

We submit that the provisions of Section 8c(19) clearly contradict petitioner's contention. Had Congress intended to leave the matter entirely to the discretion of the Secretary, there would have been no occasion for Section 8c(19).

Said section expressly provides that the approval of the producers is "required" under the applicable provi-

sions of said title, and speaks of the approval or favor as a "r rement" which shall be *held to be complied* with *if* the percentage approving or favoring is equal to or in excess of the percentage "required under such provision".

If the matter was left to the discretion of the Secretary, it would not be "required" or be a "requirement" of the law.

The fact that Section 8c(19) is silent on the effect of an unfavorable vote does not leave the Secretary free under such circumstances to make his determination in the exercise of his judgment or discretion. It is only if the percentage approving or favoring is equal to or in excess of the percentage required under the provisions of the Act that the requirements "shall be held to be complied with", and since under Section 8c(9) the order can only "become effective in the event that" at least two-thirds of the producers approve or favor the order, it necessarily follows that if less than the required percentage is not in its favor, the order *never becomes effective* under the Act.

Under Section 8c(19) there is no room for the exercise of judgment or discretion. The requirements of the Act are either met, or not, depending upon the vote. The determination of the Secretary amounts to nothing but the announcement of the vote as he finds it. The law certainly does not contemplate that the Secretary could, after an adverse vote, falsely determine that the order was approved or favored by at least two-thirds of the producers, when such was not the fact.

As a matter of fact, the Supreme Court, in *H. P. Hood & Sons* v. *United States*, 307 U. S. 588, 597, considered the validity of the referendum as conducted by the Secretary of Agriculture and carefully examined the evidence

submitted as to which of the producers were entitled to vote in the referendum and which were not. The Court said, in that connection, that it was a question of whether the statute was followed. It is evident therefore that the Supreme Court considered the vote of the producers as a condition precedent to the effectiveness of said order and that the determination of the Secretary was not arbitrary and subject to the exercise of his judgment and discretion.

We respectfully contend that the uncontradicted evidence herein shows that the referendum conducted by the Secretary of Agricutlure was not a referendum of all of the producers, as required under Sections 8c(9) and 8c(19) of said Act.

(a) The Order is void on its face in failing to comply with Sections 8c(4) and 8c(9) of said Act.

A determination by the Secretary, which is made a condition precedent to the effectiveness of the order, must, by reason of the positive provisions in Sections 8c(4) and 8c(9) of the Act, be *contained* and *recited* in the order.

In this case, the Secretary recited in the order that over 67% of the producers voting in a referedum had approved or favored the order (R. 9), but does not recite that all producers entitled to vote were given notice of the referendum. This requirement must be set forth and cannot be supplied by implication. *Panama Ref. Co.* v. *Ryan*, 293 U. S. 388, 432.

This is not a finding that more than two-thirds of the producers who, during such representative period, had been engaged in the production of such commodity for sale in the marketing area, approved or favored the order. For aught it appears on the face of the order, only a small percentage of the producers entitled to vote in the referendum might have participated therein. 67%

of the number voting favored or approved the order, and yet, said 67% of those voting may actually constitute but a small percentage of the total number of producers who were entitled to vote in said referendum.

The determination and finding of the Secretary of Agriculture, which must be set forth in the order under Section 8c(4) does not appear in the Order, and said Order is therefore unenforceable and void.

(b) Order No. 41 was illegal in that all of the producers entitled to participate in the referendum under the Act were not notified nor permitted to participate therein.

From Section 8c(9), it definitely appears that the producers referred to are *all the producers*, without exception or limitation of any kind.

From the finding of the Secretary in Order No. 41, it appears that a referendum was sought to be had of the producers who were engaged in the production of milk for sale in the Chicago, Illinois Marketing Area (R. 9, 10).

This, we contend, required that *all* producers who, during the representative period, were engaged in the production of milk for sale in the Chicago, Illinois Marketing Area, should be permitted and given an opportunity to cast their ballot in the referendum for the purpose of approving or disapproving said order.

The uncontradicted evidence, however, shows that *all* producers were not requested to participate in the referendum on the tentatively proposed marketing agreement or order.

In his affidavit, Mr. Connor, Referendum Agent designated by the Secretary of Agriculture to conduct the producer referendum, stated that the producers, who were requested to participate and who were notified to cast their ballot, were taken from a list prepared from the

records of the various health authorities in the area (R. 115).

Mr. Krueger, Chief Sanitary Officer of the Board of the City of Chicago, a witness for the petitioner, testified at the trial that the list, prepared by him and furnished to the petitioner, of producers furnishing milk in the City of Chicago, *did not include producers who furnished milk in Chicago in the form of fluid milk, or as cream, or as concentrate or evaporated or similar products for manufacturing purposes;* that up to a few months before the trial, such milk was not considered to be under the supervision of the health authorities, but since then, by reason of a ruling of the Corporation Counsel of the City of Chicago, the Board of Health did control such producers (R. 220-221).

It will be noted that tremendous amounts of milk and milk products were sold in the Chicago, area, in the City of Chicago proper, which were not under city inspection and the plants of which producers were not under government inspection. It follows that the list of the producers who furnished milk under the ordinance, secured from the public authorities, could not and did not cover all the producers who furnished milk and milk products in the Chicago area.

Section 941.4 of Order No. 41 shows that the order intends to control all milk and all milk products, not only those that were covered by ordinance of the City of Chicago (see Milk Ordinance of the City of Chicago, Chap. 154, Mun. Code, Sept. 29, 1939), but also cottage cheese and "all milk used to produce milk products" (R. 13-14).

Yet, the producers of *cheese* and *all other milk products* were not given an opportunity and had no voice in the referendum.

Section 941.4 of said order includes all milk disposed of in the form of fluid milk, regardless of whether such milk is used for purposes for which no approval by health authorities in the marketing area is necessary.

Yet, such producers whose plants were not subject to approval by health authorities, but who furnished milk in the area, and ostensibly were subject to its provisions, were not given an opportunity and had no voice in the referendum.

In July 1940, the Secretary of Agriculture promulgated an amended order and specifically omitted from the amended order fluid milk, which is used for purposes for which no approval by health authorities is necessary (R. 127). However, handlers are compelled to account for milk received from producers producing milk not qualified to be received at an approved plant, or persons operating an unapproved plant, all or a portion of which milk is disposed of as Class I milk or Class II milk in the marketing area (R. 122-123).

This indicates the scope and construction of Order No. 41 which was amplified in the amended order of July 1940.

Petitioner admits that all producers who are engaged in the production of fluid milk are affected by the order and were entitled to participate in the referendum. It is, however, contended that producers who furnished milk in Chicago in the form of fluid milk for manufacture into cheese, butter, etc., were not entitled to participate in the referendum, although the farmers could not tell when they brought their milk into the Chicago area whether it would be sold by the handlers as milk or cream or used for manufacturing purposes. In support of their position, petitioner relies upon *H. P. Hood & Sons* v. *United States*, 307 U. S. 588, 597-599.

An examination of the opinion, however, does not sustain this position, but on the contrary, fully supports respondent's contentions herein. Petitioner points out that the objection made in the *Hood* case by a large number of southern and western producers who delivered milk to stations shipping cream to the Boston market was that they should have been permitted to vote and that the Court pointed out that such producers were not engaged in the production of milk for shipment into the marketing area in fluid form and were therefore properly excluded from the referendum. The basis of the exclusion was the fact that these producers were located outside the Boston milk shed and did not produce any part of the burdensome surplus of fluid milk.

Petitioner argues, *a fortiori*, the exclusion in this case of producers engaged in producing milk for manufacture into cheese, butter, etc., was entirely proper. The fact, however, is that the Supreme Court in the *Hood* case held otherwise. The court said at p. 599:

> "There was no error in permitting the remaining groups of producers to vote. That some handlers to whom voting producers delivered milk shipped only cream during the representative period is immaterial. The farmers, it was found, cannot tell when they bring in their milk whether it will be sold by the handlers as milk or cream. As these handlers could have sent the fluid milk to the area, and in most instances did, at times other than the representative period, the milk delivered to them was a potential part of the surplus. The producers who lacked certificates of registration were properly included. Their milk was sold in the area by licensed handlers."

Under the uncontradicted facts in this case no notice was given to producers who furnished milk in Chicago in

the form of fluid milk for manufacturing purposes (R. 220, 221).

It follows therefore that while it may be true that more than 67% of the producers who *voted* in the referendum approved or favored the order, yet all of the producers in the Chicago milk-shed, who were *entitled* to vote in said referendum, *did not vote* or *cast a ballot*, thereby rendering the referendum illegal.

3. The Order is contrary to the express provisions of Section 8c(5)(G) of the Act, and other provisions thereof, and therefore void.

Section 941.1(a)(3) defines the term "producer" as any person who produces milk which is received by a handler at a plant *which is approved by any health authority* for the receiving of milk for sale in the marketing area, or who produces milk which upon proof furnished satisfactory to the Market Administrator is *qualified* to be received at such plant.

As heretofore pointed out, the Act in question in reference to producers clearly intended to include all of the producers who were engaged in the production of milk for sale in the so-called "Chicago, Illinois Marketing Area" (Sec. 8c(9)).

It is submitted that the Act of Congress does not permit nor authorize the Secretary of Agriculture, or the Market Administrator, to confine the operation of the Act to only such producers as can meet the arbitrary requirement of some health authority wholly disconnected with the Federal government or its agencies, or some Market Administrator appointed by the Secretary of Agriculture, and violates Section 608c(5)(G) reading as follows:

> "No marketing agreement or order applicable to milk and its products in any marketing area shall pro-

hibit or in any manner limit in the case of the products of milk the marketing in that area of any milk or product thereof produced in any production area in the United States."

Said order is void in that there is no definite method or means or standard provided for determining when any health authority shall approve the plant of any producer for the receiving of milk for sale in the marketing area, or what proof will be deemed satisfactory to the Market Administrator as to qualify such milk at such plant; and said order illegally delegates legislative authority to the Market Administrator.[35]

The foregoing defense is included in the denial contained in the Second Defense of respondent's answer, and is also included in respondent's Eighth Defense (R. 84, 94).

4. The Order is contrary to the express provisions of Sections 2 and 8e of the Act of Congress and therefore void.

This defense is specifically set forth in the Fourth Defense of respondent's answer (R. 89), and is also included in the denial contained in the Second Defense of respondent's answer, wherein it is denied that the order was issued by the Secretary in full compliance with the law and that all conditions precedent to the effectiveness of said order have occurred.

In Section 2 of the Act, it is expressly declared to be the policy of Congress—

"(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this title, to establish and maintain such orderly marketing condi-

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[35] *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 92.
Cline v. *Frink Dairy Co.*, 274 U. S. 445, 463.
Champlin Refining Co. v. *Commission*, 286 U. S. 210, 243.
Parks v. *Libby-Owens-Ford Glass Co.*, 360 Ill. 130, 140.

tions for agricultural commodities *in interstate commerce*, as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period; * * * The base period in the case of all agricultural commodities except tobacco and potatoes shall be the pre-war period, August 1909-July 1914. In the case of tobacco and potatoes, the base period shall be the postwar period, August 1919-July 1929.

"(2) *To protect the interest of the consumer* by * * * (b) *authorizing no action* under this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish *in subsection (1) of this section.*" (Italics ours.)

It follows that any order promulgated by the Secretary of Agriculture in violation of this section is not authorized by law and is clearly void.

Under Section 8e it is provided that if the Secretary *finds and proclaims* that, as to any commodity specified in such marketing agreement or order, the purchasing power during the base period specified for such commodity in section 2 cannot be satisfactorily determined from available statistics of the Department of Agriculture, the base period, for the purposes of such marketing agreement or order, shall be the post-war period, August 1919-July 1929, or all that portion thereof for which the Secretary *finds and proclaims* that the purchasing power of such commodity can be satisfactorily determined from available statistics of the Department of Agriculture.

It will be noted that under this section, the Secretary of Agriculture is required to *find in the order* that the pur-

chasing power, during the base period specified for such commodity in Section 2, cannot be satisfactorily determined from available statistics of the Department of Agriculture, and if he does so, he may then use the postwar period, August 1919-July 1929.

This finding must be set forth in the order as being one of the findings specifically required in addition to those specified in Section 8c(4).

It is not sufficient, as contended by petitioner herein, to issue a separate proclamation in a separate document instead of including it in his order.

Section 8c(4) expressly provides that the Secretary of Agriculture must find and set forth "in such order", "in addition to such other findings as may be specifically required *by this section*".

Since Section 8c is clearly *a part of Section 8*, we cannot understand petitioner's contention that that section "refers only to findings required by Section 8c of the Act and not Section 8e".

Petitioner also urges that it has been the consistent administrative practice to issue separate proclamations as to the base period in connection with marketing agreements and orders, and that no court has disapproved the practice. Suffice it to say that this question has never been called to the attention of the court and has never been passed upon or approved by the courts.

It is contended by petitioner that the opinion in the *Hood* case reveals that a similar proclamation with respect to the base period was issued separately from and at least eleven days before the issuance of the order there involved, 307 U. S. 592. The opinion, however, does not disclose that the order did not also embody a finding and proclamation, as required by Section 8c(4); *neither was the point*

here involved in any wise mooted or passed upon by that court.

While the order recites that the Secretary has found and proclaimed the period August 1919-July 1929 to be the base period to be used in determining the purchasing power of milk sold in the Chicago, Illinois Marketing Area (R. 10), we find no finding, as required by Section 8c(4) and Section 8e, that the purchasing power during the base period specified for milk in Section 2 of said Act cannot be satisfactorily determined from vital statistics of the Department of Agriculture.

We submit that the order is void for this reason.

Where a finding a fact of an administrative officer or department is prerequisite to the making of a rule or order, the finding must be explicitly set out and a failure so to do is a fatal defect.

Panama Ref. Co. v. *Ryan*, 293 U. S. 388
United States v. *C. M. P. & P. R. Co.*, 294 U. S. 499
Atchison, T. & S. F. R. Co. v. *United States*, 295 U. S. 193, 202
Florida v. *United States*, 282 U. S. 194, 215[36]

[36] In the *Panama* case *supra*, the court said, (293 U. S. 432) quoting from *Wichita R. & Light Co.* v. *Public Utlities Commission*, 260 U. S. 48, 59:

"In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action. When, therefore, such an administrative agency is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective. It is pressed on us that the lack of an

As heretofore shown, Congress had definitely designated in Section 2(1), *supra*, the pre-war period as the base period in all agricultural commodities other than tobacco and potatoes. Presumably, at the time the law was enacted, the prices received by farmers for these commodities were carefully considered and deemed adequate. This is evidenced by the fact that only as to two agricultural commodities an exception was made. Presumably, the law would not have been passed unless the consumer was protected against high and exorbitant prices which might be paid to the farmers under marketing agreements or orders promulgated under said Act, to the detriment of the consumer. Hence, the positive prohibition against any action which might injure the consumer.

The requirement on the part of the Secretary to make a finding and proclamation only in the event that statistics are not available in the Department of Agriculture so that the purchasing power during the base period could not be satisfactorily determined, is a material and not a mere technical requirement.

Sections 2 and 8c do not vest any discretion in the Secretary to adopt one *or* the other base periods. The objection to the constitutionality of the Act that delegated certain legislative powers to the Secretary was resolved in favor of the Government by the Supreme Court in the case of *United States* v. *Rock Royal Corporation*,

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express finding may be supplied by implication and by reference to the averments of the petition invoking the action of the Commission. We can not agree to this." Referring to the ruling in the *Wichita R. & Light Co.* Case, the Court said in *Mahler* v. *Ebby*, 264 U. S. 32, 44, 68 L. ed. 549, 556, 44 S. Ct. 283:

"We held that the order in that case made after a hearing and ordering a reduction was void for lack of the express finding in the order. We put this conclusion not only on the language of the statute but also on general principles of constitutional government."

307 U. S. 553, because the court held the Secretary's duties were specific and his discretion circumscribed by definite formulae.

As a matter of fact, the uncontradicted evidence shows that the Secretary had the necessary data in his possession and that he in fact offered the same in evidence at the hearing on the then proposed order.[37]

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[37] In defendant's Exhibit 1 appears a statement concerning the Chicago Milk Market and the proposed marketing agreement and order prepared by L. K. Wallace, Agricultural Economist, and P. L. Miller, Principal Agricultural Economist, United States Department of Agriculture, Division of Market and Marketing Agreements, Dairy Section, June 1939, which was offered in evidence as United States Department of Agriculture Exhibit No. "2." As a part thereof the following tables were offered in evidence and are set forth in the appendix hereto attached, pp. xiii to xix.

Table 1, showing index numbers, prices paid by farmers for commodities bought in 1910 to 1939, compiled from Reports of the Bureau of Agricultural Economics; (App. xiii).

Table 4—Prices paid producers per hundredweight of milk, Chicago, Illinois, 1909-1933; (App. xiv).

Table 5—Dealers buying prices of 3.5% milk per hundredweight, Chicago, Illinois 70 mile zone, and Milwaukee, Kenosha, Racine, South Bend and Rockford, f.o.b. city, 1919-1938, compiled from Reports of the Bureau of Agricultural Economics; (App. xv).

Table 6—Table showing milk, whole, wholesale prices per hundredweight received by farmers in Illinois 1909-1939, compiled from Reports of the Bureau of Agricultural Economics; (App. xvi).

Table 7—Milk, whole, wholesale price per hundredweight, received by farmers in Indiana 1909-1939; compiled from Reports of the Bureau of Agricultural Economics; (App. xvii).

Table 8—Milk, whole, wholesale prices per hundredweight received by farmers in Wisconsin 1909-1939, compiled from Reports of the Bureau of Agricultural Economics; (App. xviii).

Table 9—Milk, whole, wholesale prices per hundredweight received by farmers in Michigan 1909-1939, compiled from Reports of the Bureau of Agricultural Economics (App. xix).

It is contended by petitioner, however, that the prices specified in the Tables offered in evidence by the Government at the hearing, are not on a classified use basis and are not satisfactory statistics for computing the purchasing power of milk to be sold on a classified use basis.

We submit the point is without merit. The classified use basis under Section 8(c)5 is to determine what each of the *handlers* should pay, subject to adjustments, depending on the form or the purpose of use.

The price to the farmer is the same in any event. Hence the prices paid to the farmers during the pre-war period, as shown by the Tables, offered in evidence by the Secretary of Agriculture, are satisfactory from every standpoint for computing the purchasing power of milk, wholly unaffected by its subsequent use.

As a matter of fact, the Secretary actually used available statistics in the Department of Agriculture to determine the purchasing power of milk when he determined to use the pre-war period as the base in another milk marketing agreement in effect in the Chicago marketing area.

Under Section 941.5 of Order No. 41, it is provided that the minimum price for Class 1 milk shall be computed pursuant to the formula, as set forth in Section 1 of Article 6 of the Marketing Agreement for Evaporated Milk issued by the Secretary on May 31, 1935 (R. 15).

Thus this particular marketing agreement by reference is part and parcel of Order No. 41. In said Marketing Agreement for Evaporated Milk of May 31, 1935, the Secretary of Agriculture finds that it is necessary to fix minimum prices to be paid to producers that will approach a point "where the milk produced by such producers has a purchasing power more nearly equivalent to the purchasing power of such milk of August 1909-July 1914."

By these findings the Secretary admits that he has sufficient statistics bearing on the purchasing power of milk during the pre-war base period, August 1909-July 1914, in and for the State of Illinois, which includes the Chicago marketing area.

We submit that in view of this uncontradicted evidence, it affirmatively appearing that the Department of Agriculture *had the necessary statistics in its possession*, and in view of the total absence of *any finding in the order* that the Department of Agriculture did not have available statistics, as required by the Act, *the order must be held to be invalid as not in compliance with the positive requirements of the Act.*

It is further contended by petitioner that the finding of the Secretary of Agriculture that his department did not have available statistics which were satisfactory, was a determination wherein he exercised administrative discretion which was final and could not be reviewed by the courts.

The Supreme Court of the United States, however, has held otherwise. In *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 52, the Court aptly said:

> "Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards."

We submit that the authorities relied upon by petitioner have no application to the facts and the law in this case. Under Sub-Section (2)b of Section 2, Congress expressly declared that in order to protect the interest of the consumer it *authorized no action* under this title which has for its purpose the maintenance of prices to farmers above the level which is declared to be the policy of Congress in Sub-Section 1, namely that the base period shall be the pre-war period.

While Section 8e amends Section 2 in permitting the Secretary to use the post-war period as the basis upon the conditions therein set forth, nevertheless it must be borne in mind that Congress, by Sub-Section 2 of Section 2 for the protection of the consumer, did not authorize any act on the part of the Secretary of Agriculture which has for its purpose the maintenance of prices to farmers above the level set forth in Sub-Section 1 of Section 2. It therefore becomes a question of law to determine whether the prices fixed by the Secretary of Agriculture based upon the post-war period were in fact authorized by Congress and in compliance with the Act.

Table 4 (appendix xiv) shows that the farmer received during the pre-war period, August 1909 to July 1914, considerably less than in the post-war period. It is evident, therefore, that by the use of the post-war period in the order here under consideration, the farmer was enabled to secure and does secure a higher price than he would have received had the pre-war period base been used, as provided in Sub-Section 1 of Section 2 of the Act.

The failure of the Secretary of Agriculture to adhere to the statutory and legal formula, punishes respondent, if the Act be held legal, to pay a minimum price for milk vastly in excess of the pre-war price and *the consumer*, of course, likewise is compelled to pay more for the product than the law contemplated.

The finding of the Secretary of Agriculture that the purchasing power during the pre-war base period could not be satisfactorily determined from available statistics is not conclusive but is subject to review by the courts in order to determine whether the action has in fact been authorized by Congress in view of the limitation contained in Sub-Section 2 of Section 2 of the Act.

In *H. P. Hood & Sons* v. *United States*, 307 U. S. 588, 595, the Supreme Court said:

> "*Ordinarily the base period of section 2 is to be used. It is only after a finding* that the purchasing power of the commodity during the period fixed in section 2 cannot be satisfactorily determined from available statistics of the Department of Agriculture, that the Secretary, by Section 8c, is authorized *to find* and *proclaim* the postwar period." (Italics ours.)

In that case, it was contended that an amendment to an order required the finding and proclamation by the Secretary as to the absence of statistics for the pre-war period available for use, which amendment, however, did not attempt to change the base period.

The Court said (p. 596):

> "There would seem to be no occasion to review the absence of satisfactory statistics, however, on a proposed amendment which does not involve any change in the base period."

We submit that the Supreme Court recognized the Court's right to review the absence or existence of satisfactory statistics and whether the Secretary complied with the requirements of the statute in his finding and proclamation.

We submit that in the absence of a showing and proper finding by the Secretary that the statistics are not available as required by Section 8(e) the order is void and is not authorized by and contrary to Section 2 of said Act.

II.

The District Court committed prejudicial error in striking respondent's fourth to eleventh defenses, both inclusive.

1. The Fourth Defense.

This defense (R. 89-91) was discussed under Part Two, point 4, (*supra*).

2. The Fifth Defense.

The Fifth Defense (R. 91-92) alleges that the Act is unconstitutional and void in that it delegates to the Secretary legislative powers contrary to Article I, Section 1, and Article I, Section 8, paragraph 18 of the Constitution of the United States, and that Order No. 41 promulgated thereunder is therefore void and unenforceable.

By Section 8c(18) of said Act, Congress delegated to the Secretary of Agriculture authority to fix such prices to producers of milk as he finds in his opinion will reflect the price of feeds, the available supply of feeds, and other market conditions which affect market supply and demand for milk and its products in the marketing area, insure a sufficient quantity of pure and wholesome milk, and be in the public interest, and "*thereafter, as the Secretary finds necessary* on account of changed circumstances, *he shall*, after due notice and opportunity for hearing, *make adjustments in such prices.*"

We submit that this power is practically *without limitation* and may be in utter disregard of the express dec-

laration of the policy to Congress as expressed in Section 2 of said Act and without regard to the interests of the handler of the product and of the consumer, and authorizes the Secretary to fix high and exorbitant prices of milk to farmers and compel handlers of milk to pay said high and exorbitant prices irrespective of the base period mentioned and provided for in said Acts.

By Section 10c of said Act, Congress delegated to the Secretary of Agriculture *unlimited authority*, with the approval of the President, to make such regulation with the force and effect of law as may be necessary to carry out the powers vested in him by said title, and provided that any violation of any regulation shall be subject to such penalty, not in excess of $100, as may be provided therein.

Petitioner relies upon *United States* v. *Rock Royal Co-Operative, Inc.*, 307 U. S. 533, 557, 574, as having decided this question adversely to respondent's contention.

While a majority of the Court did discuss the method of fixing minimum prices in the first instance by the Secretary of Agriculture under paragraph 8c(18) and found that this did not constitute an unlawful delegation of authority to the Secretary of Agriculture, and a vigorous dissenting opinion by three of the Justices was to the contrary, nevertheless it will appear that the points raised herein as constituting an unlawful delegation of authority to the Secretary of Agriculture were neither discussed nor passed upon by the Supreme Court. An examination of the Act will disclose that in the first instance the Secretary of Agriculture was given the power to fix prices according to certain requirements which the majority of the Supreme Court held were sufficient to sustain its validity, but nothing was said with regard to the *broad and unlimited provisions* permitting the Secretary "there-

after" to make adjustments in such prices practically without limitation.

The Act expressly provides that the original order must be "upon the basis of the evidence adduced at the hearing," but the Secretary is not bound by any such limitation as to subsequent changes in the order.

Neither did the Supreme Court pass upon the validity of paragraph 10c of the Act—the unlimited authority with the approval of the President to make such regulation *with the force and effect of law* as he may deem necessary to carry out the powers vested in him by said title and to impose penalties for the violation thereof.

Petitioner relies upon *United States* v. *Grimaud*, 220 U. S. 506, in support of its contention that "the authority to make regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this title is valid."

We submit, however, that the *Grimaud* case does not support its contention in that the penalties imposed for violation of the administrative regulations was in that case imposed by Congress itself and was not delegated to the Secretary of Agriculture, as in this case. In this case the Secretary was delegated the authority to make regulations *with the force and effect of law* and allowed the Secretary to prescribe penalties according to his own errant will and discretion.

This, the Supreme Court in the *Grimaud* case said, could not be done. The court there pointed out that Congress cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of facts upon which the law makes or intends to make its own action depend: "That the Secretary of Agriculture could not make rules and regulations for any and every purpose."

Citing *Williamson* v. *United States*, 207 U. S. 462, the court further points out with reference to the act there under consideration that "a violation of reasonable rules regulating the use and occupancy of the property is made a crime *not by the Secretary* but by Congress. *The statute, not the Secretary*, fixes the penalty."

It is evident from the foregoing that the court would have held the provisions void had Congress delegated to the Secretary of Agriculture the right to make regulations with the force and effect of law and to prescribe penalties therefor, since the penalties in such case would be made by the Secretary and not by Congress, and the regulations would fix the penalty and not the statute.

We submit that the language of the dissenting opinion in the case of *United States* v. *Rock Royal Co-Operative, Inc.*, 307 U. S. 582, is particularly true and applicable to the points raised by this respondent *and not passed upon by the Supreme Court*, wherein it is said:

> "A cursory examination of the statute shows clearly enough the design to allow a Secretary to prescribe according to *his own errant will* and then to execute. *This is not governed by law but by caprice. Whimseys may displace deliberate action* by chosen representatives and become rules of comment. To us the outcome seems wholly incompatible with the system under which we are supposed to live." (Italics ours.)

It is however urged by petitioner that it does not appear that any orders or regulations issued under Sections 8c(8) and 10(c) have been in any way prejudicial to respondent and that respondent therefore has no standing to question their constitutionality. It is admitted that the Secretary did amend Order 41, under Section 8c(18), during the pendency of the action, which will affect respondent's rights, if same be deemed valid.

Under Section 10c the Secretary promulgated regulations and penalties which it is claimed respondent failed to comply with, and for which a mandatory injunction is being sought by the petitioner.

We submit that respondent is vitally concerned as to whether he is subject to the amended Order now in effect and whether he is subject to the regulations and penalties imposed by the Secretary under the Act.

3. The Sixth Defense.

The Sixth Defense (R. 92) asserts that the Act is invalid as being in conflict with the anti-trust laws of the United States in that said order creates, fosters and provides for an unlawful monopoly, pool, trust, combination and confederation among producers and handlers of milk who participate therein to regulate and fix the price of milk to farmers; that said order is expressly contrary to the provisions of Sections 1 and 2 of an Act of Congress of July 2nd, 1879, c 647, 26 Stat. 209 (15 U.S.C.A. Commerce and Trade) and Section 13 (15 U.S.C.A.), and other Acts of Congress, being some of the antitrust laws enacted by Congress, that the enforcement of said order against this respondent would subject this respondent to criminal prosecution under Federal laws prohibiting engaging in any such combination or conspiracy for the purpose of fixing prices of commodities, and that said Order No. 41 is therefore illegal and void.

There are two methods whereby orders may become effective under the Act: Under Section 8c(8) an order may become effective if more than fifty per cent of the handlers of the commodity have consented to the marketing agreement and such order is approved by two-thirds of the producers; or, under Section 8c(9), in cases where more than fifty per cent of the handlers have refused to

sign a marketing agreement and two-thirds of the producers approve thereof.

It will be noted that in each case the effectiveness of the order depends upon the agreement by more than two-thirds of the producers to the price fixing arrangement provided in said order, which may or may not be consented to by the handlers. The agreement among the producers is clearly the establishment of a monopoly or combination or confederacy for fixing the price of a commodity within the Sherman Anti-Trust Act, *without which agreement the order under the Act can never become effective.*

We submit that the proceedings herein are an effort by the Secretary of Agriculture to compel the respondent, *who is engaged purely in intrastate business, and therefore subject to State control,* to participate in this illegal pool or combination which, under the Sherman Anti-Trust Act, would make the respondent a participant and subject to its penalties. While the Act contains provisions exempting marketing agreements, Section 8(b) and Section 3(d) of the Act, such provisions do not apply to orders and, therefore, no such exemption exists with regard to Order No. 41.

Whenever Congress entered the field of price fixing, it has in the past inserted a provision in the respective Acts exempting persons who participate therein from the provisions of the antitrust laws of the United States. This was true in the case of *National Industrial Recovery Act,* June 16, 1933 (Title 15 U.S.C.A. Sec. 701) the *Bituminous Coal Act,* April 26, 1937, Title 15, Sec. 832 (d), the *Motor Carrier Act,* of 1935, as amended, Title 49, Sec. 313(f), and others. These provisions apply to orders issued by the governmental agency as well as to voluntary agreements entered into pursuant to such acts. The Supreme Court has heretofore pointed out that the penalties of the

Sherman Act could not be evaded except by the method adopted by Congress by proper enactments alleviating the penalties of the Sherman Act through approval by designated public representatives. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 227.

We submit that in the absence of some such provision exempting the producers and handlers of milk from complying with the order, the handlers would nevertheless be subject to Federal prosecution under the antitrust laws and the knowledge and acquiescence of the Federal Government would be no defense thereto.[38]

4. The Seventh Defense.

This defense (R. 93) presents the same question as applied to the State Anti-Trust Laws of Illinois as the one discussed under the Sixth Defense (Part Two, point II, 3, *supra*), and the argument there made is equally applicable. The fact that respondent is engaged entirely in intrastate business and therefore subject to local State control emphasizes the importance of our contention. Congress could have inserted an exemption both as against "State or Federal" antitrust laws, as it did in the *Motor Carrier Act*, but did not see fit to do so.

The Courts cannot legislate for Congress and supply a provision presumably intentionally omitted by Congress.

5. The Eighth and Ninth Defenses.

These defenses (R. 94-96) have been argued under Part Two, point I, 2 and 3, *supra*.

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[38] See *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 225. And see footnote 60 appended to this opinion in 84 L. Ed. p. 1170.

6. The Tenth Defense.

This defense (R. 97), alleges that said order is unlawful, discriminatory, unreasonable, void and contrary to the Act in that the Secretary arbitrarily designated in Sec. 941.1(1) of said order the cities, towns and villages of Chicago, Evanston, Wilmette, Kenilworth and Glencoe as the "Chicago, Illinois Marketing Area," and arbitrarily omitted from said marketing area other cities, towns and villages marketing milk under the same or similar circumstances and located in the same County and State adjoining the City of Chicago, or in its vicinity, such as Oak Park, Berwyn, Cicero, and others.

It was alleged in the Tenth Defense of respondent's answer that the prices which handlers are compelled to pay producers under Order No. 41 are considerably higher than handlers pay producers for said commodity for sale other than in said marketing area designated by said Order No. 41 in cities, towns and villages in the immediate vicinity of Chicago and said marketing area, such as Oak Park, and others; that handlers of milk engaged in the Chicago, Illinois Marketing Area, who are compelled to comply with Order No. 41, would be discriminated against and be unable to compete with unregulated milk in other adjoining areas under the same or similar conditions, and thereby be deprived of their constitutional rights to engage in their lawful occupation in the State of Illinois except at great loss and irreparable damage.

The merit in respondent's contention was recognized by the Secretary of Agriculture in the order promulgated by the Secretary, effective July 1st, 1940, wherein the marketing area is enlarged to include the village of Oak Park. (See Sec. 941.1(a)(1) of said order, as amended, (R. 122).)

In view of the express provisions contained in Section 8c(11)B of said Act, providing that the marketing area in the case of milk and its products shall not be the smallest regional production area or regional marketing area, or both, this question is taken out of the realm of administrative policies over which the Secretary of Agriculture has exclusive jurisdiction, but makes it a question of law for the courts to determine whether or not the order as promulgated by the Secretary actually complies with the requirements of the Acts of Congress, which are mandatory.

Petitioner contends that this question was decided in *United States* v. *Rock Royal Co-Operative, Inc.*, 307 U. S. 533, 565-566.

We submit that this question herein urged was not considered by the Supreme Court in that case.

It is further urged by petitioner that the District Court correctly sustained the motion to strike this defense, *as in any event* there was no prejudicial error in such ruling because the evidence before the Secretary, which was included in respondent's exhibits 1, 2, 3 and 4, was admitted in evidence at the final hearing.

We submit that a careful examination of respondent's exhibits 1 to 4 fail to disclose any competent evidence which warranted such finding on the part of the Secretary.

The fact however is that there was *no hearing* on the *proposed order* as heretofore shown *and no opportunity* given to any of the parties to produce evidence to show the harmful effect of such arbitrary designation of territory by the Secretary. The area finally designated by the Secretary as the marketing area was not known at the time of the hearing by the handlers or producers and presumably included competing territory subsequently arbitrarily omitted. The area was arbitrarily and cap-

riciously designated by the Secretary in violation of the Act without a hearing and without competent evidence to support it, and the order is therefore contrary to provisions of the Act and void.

7. The Eleventh Defense.

The Eleventh Defense (R. 97) sets forth that the order is unenforceable, discriminatory, unreasonable and void in that it is contrary to the declaration of conditions and declaration of policy of Congress as set forth in Section 1 and Section 2 of said Act for the reasons therein set forth.

Petitioner contends that the Courts are not concerned with the wisdom and economic policy of a regulation imposed under legislative enactment.

Such has been the ruling of the Supreme Court. However, we contend that in view of Sections 1 and 2 of said Act and the express limitation therein "authorizing no action" under said title contrary to the declared policy of Congress, it is the duty of the Courts to determine the validity of all orders promulgated by the Secretary to ascertain whether such action was in conformity with the declared policy of Congress, or whether such action was, in fact, authorized by law.

The motion to strike admitted the facts in said defense alleged, which facts showed a condition created by said order in violation of the declared policy of Congress. The motion to strike should have been denied.

8. The Twelfth Defense.

This defense alleged (R. 118-141) that during the pendency of said cause, the Secretary had promulgated an Order, No. 41, as amended, to regulate the handling of milk, effective July 1st, 1940, in substitution of Order No. 41 herein sought to be enforced. (Compare Order No. 41 (R.

8-22) with the substituted Order (R. 120-141)). Plaintiff admitted the issuance of said amended Order in its supplemental motion for summary judgment (R. 144, 145).

Order No. 41, as amended, does not preserve existent rights under Order No. 41. The amended Order covers the whole subject of Order No. 41, embraces new and different provisions, and plainly shows that it was intended not only as a substitute for the earlier Order but to cover the whole subject. The amended Order clearly repealed the former Order.[39]

Petitioner contends that by Section 941.12c (R. 21) of the Order existing obligations under the Order survived in case of suspension or termination of the Order, and that the amended Order contained an identical clause (R. 140) as in Order No. 41, and that by reason thereof the obligation to make payments by the handler survived.

The Order was neither suspended nor terminated when amended Order No. 41 was promulgated in its place and stead. The provisions of Order No. 41, as amended, never became effective until July 1, 1940, hence, any provisions contained in the amended Order cannot be considered to have a retroactive effect in the absence of an express savings provision.

We submit that had petitioner, when Order No. 41, as amended, effective July 1, 1940, amended its complaint and prayed for relief with regard to Order No. 41, as amended, a different question might have been presented. The complaint, however, seeks a preliminary and permanent injunction against respondent to compel respondent to comply with Order No. 41, which, at the date of the hearing, had

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[39] *Murphy* v. *Utter*, 186 U. S. 95, 105
The Paquete Habana, 175 U. S. 677, 685
United States v. *Tynen*, 11 Wallace, 88, 95, 20 L. Ed. 153, 155

admittedly become ineffective. To issue an injunction to compel respondent to comply with an Order which admittedly was no longer effective would have been a useless act. No money judgment was sought by petitioner (See complaint R. 7). Hence, the court could not grant any effective relief.

The case now presents only a moot question.[40]

CONCLUSION.

We submit that petitioner's contention, that purely intrastate transactions which are in any wise *in competition* with products which cross State lines are subject to Federal control under the Commerce Clause of the Constitution, presents one of the most important constitutional questions submitted to the Courts since the adoption of the Constitution.

The issues presented, briefly, are as follows:

1. Has Congress the power, if it had exercised such power—a fact which we strenuously deny—to deprive the States and the people of the rights reserved to themselves under the Constitution, by embracing transactions having an *indirect* effect upon interstate commerce, (which would practically control all activities of the people), so that the authority of the State over its domestic concerns would exist only by sufferance of the Federal Government?

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[40] *City of Paducah* v. *Paducah Water Co.*, 258 F. 20, 22
Berry v. *Davis*, 242 U. S. 468
W. Ames & Co. v. *Wallace*, 81 F. (2d) 414
Selected Products Corp. v. *Humphreys*, 86 F. (2d) 821 (C.C.A. 7th)

We submit that such a construction would give the Federal Government unlimited power to control every industry, enterprise and endeavor of the people, contrary to the intent of the framers of the Constitution of the United States and its express provisions.

2. May the Courts usurp the functions of Congress by construing an Act contrary to the express intent of Congress and contrary to the express provisions thereof?

The Constitution does not permit the Judicial Department to legislate by construction. Neither can Congress in passing the laws usurp the powers expressly reserved to the States and the people under the Constitution.

As the Supreme Court said in *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, 649,

> "Official powers cannot be extended beyond the terms and necessary implications of the grant. If broader powers be desirable, they must be conferred by Congress. They cannot be merely assumed by administrative officers; nor can they be created by the courts in the proper exercise of their judicial functions."

The contention of petitioner presents a dangerous doctrine which, if adopted, would not only revolutionize the settled law of this Country but would act as the entering wedge which ultimately could remove every vestige of State control and State prerogatives in utter disregard of vital and fundamental rights now preserved to the States under the Constitution.

If the Courts can legislate under the guise of construction, or if Congress can, under the pretext of necessity, usurp the powers of the State, in disregard of the express provisions of the Constitution, what assurance is there then that any other provision in the Constitution might not likewise, under the same or some other pretense, be subject

to wrongful amputation or discard by the Courts or Congress?

We submit that if the people actually desire a centralized government with unlimited powers, the only method provided by law to accomplish such purpose is *by amendment* to the Constitution.

Irrespective of this contention, it is evident that Order No. 41 was not issued pursuant to law, is in other respects invalid, and therefore unenforceable and void.

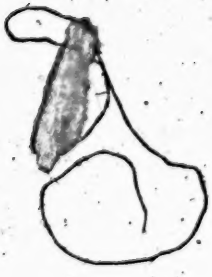
WHEREFORE, it is respectfully submitted that the decision of the Court below be affirmed and that cross-petitioner have such other relief in the premises as to the Court may seem meet.

Respectfully submitted,

ALVIN E. STEIN,
Attorney for Respondent and Cross-Petitioner.

January 1942.

APPENDIX



APPENDIX.

EXCERPTS OF MARKETING AGREEMENT
(Defendant's Exhibit 1, p. 28)

Notice of hearing signed by the Secretary of Agriculture June 9, 1939.

UNITED STATES DEPARTMENT OF AGRICULTURE
Division of Marketing and Marketing Agreements

PROPOSED MARKETING AGREEMENT AND PROPOSED ORDER REGULATING THE HANDLING OF MILK IN THE CHICAGO, ILLINOIS, MARKETING AREA, UPON WHICH THE SECRETARY OF AGRICULTURE HAS ISSUED NOTICE OF HEARING UNDER THE AGRICULTURAL MARKETING AGREEMENT ACT OF 1937.

Section 1. *Definitions.* (a) Terms. The following terms as used herein *shall* have the following meanings:

(1) The term "Chicago, Illinois, means area," hereinafter called the "marketing area;" means the territory within the corporate limits of Chicago, Illinois, and all that territory lying within the boundaries of Cook County and Du Page County in the State of Illinois; the townships of Wheaton, Du Page, Plainfield, Lockport, Homer, Troy, New Lenox, Frankfort, and Crete in Will County in the State of Illinois; and the townships of St. John, Ross, North Calumet, and Hobart in Lake County in the State of Indiana.

* * *

(3) The term "producer" means any person, irrespective of whether any such person is also a handler, who produces milk in conformity with, or subject to, the health requirements applicable for milk to be sold for

consumption as milk in the marketing area, and whose milk is received by a handler for shipment to or for sale in the marketing area: Provided, That if such producer has not regularly distributed milk in the marketing area or has not sold milk to a handler for a period of 30 days prior to the effective date hereof but begins the regular delivery of milk to a handler, he shall be known as a "new producer" for a period beginning with the date of his first delivery of milk and including the first 2 full calendar months following the date of such first delivery to a handler, after which he shall be known as a "producer."

(4) The term "handler" means any person, who on his own behalf or on behalf of others, purchases or receives milk from producers, new producers, association of producers, or other handlers, all or a portion of which milk is shipped to or sold in the marketing area in the form of fluid milk, and who on his own behalf or on behalf of others engages in such handling of milk as is in the current of interstate commerce or which directly burdens, obstructs, or affects interstate commerce in milk and its products. This definition shall be deemed to include a cooperative association which causes milk to be delivered from a producer or a new producer to a handler, or causes milk of a producer or a new producer to be delivered to a nonhandler's plant from which no milk is sold in the marketing area, for the account of such cooperative association and for which such cooperative association collects payments.

• • •

Sec. 2 Market Administrator.

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(4) Publicly disclose to handlers and producers, unless otherwise directed by the Secretary, the name of any per-

son, who, within 2 days after the date upon which he is required to perform such acts, has not (a) made reports pursuant to Sec. 3 or (b) made payments pursuant to Sec. 8.

Sec. 3 . . .

(1) On or before the 7th day after the end of each delivery period (a) the receipts of milk at each plant from producers and new producers, (b) the receipts of milk at each plant from handlers, (c) the receipts at each plant of the milk, if any, produced by him, (d) the utilization of all receipts of milk from the delivery period, and (e) the name and address of each new producer.

(2) Within 10 days after the market administrator's request with respect to any producer and new producer for whom such information is not in the files of the market administrator and with respect to a period or periods of time designated by the market administrator (a) the name and address, (b) the total pounds of milk delivered, (c) the average butterfat test of milk delivered, and (d) the number of days upon which deliveries were made.

(3) On or before the 20th day after the end of each delivery period, his producer pay roll, which shall show for each producer and new producer (a) the total delivery of milk with the average butterfat test thereof, (b) the net amount of the payment to such producer and new producer made pursuant to Sec. 8, and (c) the deductions and charges made by the handler.

(4) On or before the 7th day after the end of each delivery period, the sale or disposition of Class I milk outside the marketing area, pursuant to Sec. 5(b) as follows; (a) the amount and the utilization of such milk, (b) the butterfat test thereof, (c) the date of such sale or disposition, (d) the point of use, (e) the plant from

which such milk is shipped, and (f) such other information with respect thereto as the market administrator may require.

• • •

Sec. 4 *Classification of Milk.* (a) *Class definitions.* Milk received by each handler, including milk produced by him, if any, shall be classified by the market administrator as follows:

(1) Class I milk shall be all milk disposed of in the form of milk, whether plain or flavored, and all milk not accounted for as Class II milk or Class III milk.

(2) Class II milk shall be all milk used to produce cream which is disposed of in the form of cream (for consumption as cream), ice cream, and ice cream mix.

• • •

Sec. 5 *Minimum prices.* (a) *Class prices.* Except as set forth in paragraph (b) of this section, each handler shall pay, f. o. b. any plant located not more than 70 miles from the marketing area, at the time and in the manner set forth in Sec. 8 not less than the following prices for milk received at such handler's plant:

Class I milk—The price per hundredweight which shall be calculated by the market administrator as follows: add 80 cents to the price per hundredweight for milk of 3.5 percent butterfat content set forth in the marketing agreement for evaporated milk issued by the Secretary on May 31, 1935, or any amendment issued thereto. Provided, That, in no event shall the price for Class I milk during any delivery period be less than $1.80 per hundredweight or more than $2.20 per hundredweight. In the event the said marketing agreement for evaporated milk be terminated, the price for Class I milk shall be calculated by the market administrator as follows: multiply by 3.5

the average price per pound of 92-score butter at wholesale in the Chicago market for the delivery period during which such milk was received, plus 30 percent thereof, plus 80 cents: Provided, That in no event shall the price for Class I milk during any delivery period be less than $1.80 per hundredweight or more than $2.20 per hundredweight.

Class II milk—The price per hundredweight which shall be calculated by the market administrator as follows: divide by 33 the weighted average wholesale price per 40-quart can of bottling quality cream in the Chicago market, as reported by handlers and other persons receiving such cream for the delivery period during which such milk is delivered, multiply the result thereof by 3.5, subtract therefrom 25 cents per hundredweight, and add ..... cents (an amount equivalent to the value of skim milk).

Class III milk—The price per hundredweight which shall be calculated by the market administrator as follows: Multiply by 3.5 the average price per pound of 92-score butter at wholesale in the Chicago market, as reported by the United States Department of Agriculture, for the delivery period during which such milk is delivered, and add 10 percent.

(b) *Sales outside the marketing area.* The price to be paid by a handler for Class I milk disposed of outside the marketing area, in lieu of the price otherwise applicable pursuant to this section, shall be such price as the market administrator ascertains is being paid by processors in the market where such milk is disposed of for milk of equivalent use.

Sec. 6. *Handlers who are also producers.* (a) *Application of provisions.* No provision hereof shall apply to a handler who is also a producer and who purchases no milk from producers or an association of producers, except

that such handler shall make reports to the market administrator at such time and in such manner as the market administrator may request.

(b) In the case of a handler who is also a producer and who purchased milk from producers, the market administrator shall, before making the computations set forth in Sec. 7, (a) exclude from such handler's Class I milk up to but not exceeding 90 percent of the quantity of milk produced and sold by him, (b) exclude the milk purchased by him in each class from other handlers, and (c) exclude from his remaining Class III milk the balance of the milk produced and sold by him.

Sec. 7 *Determination of uniform prices to producers.* (a) *Computation of value of milk for each handler.* For each delivery period the market administrator shall compute, subject to the provisions of Sec. 6, the value of milk disposed of by each handler which was received from producers and new producers by (a) multiplying the quantity of such milk in each class by the price applicable pursuant to Sec. 5, and (b) adding together the resulting values of each class.

• • •

(1) Combine into one total the respective values of milk, computed pursuant to paragraph (a) of this section, for each handler who made the report as required by Sec. 3(a) for such delivery period and who made the payments required by Sec. 8 for milk received during the delivery period next preceding but one;

(2) Subtract the total amount to be paid to producers pursuant to Sec. 8(a)(2);

(3) Divide by the total quantity of milk which is included in these computations except that milk required to be paid for pursuant to Sec. 8(a)(2);

(4) Subtract not less than 4 cents nor more than 5 cents for the purpose of retaining a cash balance in connection with the payments set forth in Sec. 8(a)(3);

(5) Add an amount which will prorate, pursuant to paragraph (c) of this section, any cash balance available; and

(6) On or before the 12th day after the end of each delivery period mail to all handlers and publicly announce (a) such of these computations as do not disclose information confidential pursuant to the act, (b) the blended price per hundredweight which is the result of these computations, and (c) the price of Class I milk, Class II milk, and Class III milk.

(c) *Proration of cash balance.* For each delivery period the market administrator shall prorate, by an appropriate addition pursuant to paragraph (b) of this section, the cash balance, if any, in his custody from payments made by handlers for milk received during the delivery period next preceding but one, to meet obligations arising out of Sec. 8(a)(3).

Sec. 8 *Payments for milk.* (a) *Time and method of payment.* On or before the 25th day after the end of each delivery period, each handler shall make payment, subject to the butterfat differential set forth in paragraph (c) of this section, for the total value of milk received during such delivery period as required to be computed pursuant to Sec. 7(a), as follows:

(1) To each producer, except as set forth in subparagraph (2) of this paragraph, at the blended price per hundredweight computed pursuant to Sec. 7(b), subject to the differentials set forth in subparagraph (1) of paragraph (d) of this section, for the quantity of milk delivered by such producer;

(2) To any producer, who did not regularly sell milk for a period of 30 days prior to the effective date hereof to a handler or to persons within the marketing area, at the Class III price, in effect for the plant at which such producer delivered milk, for all the milk delivered by such producer during the period beginning with the first regular delivery of such producer and continuing until the end of 2 full calendar months following the date of such first delivery to a handler.

(3) To producers, through the market administrator, by paying to or receiving from the market administrator, as the case may be, the amount by which the payments made pursuant to subparagraphs (1) and (2) of this paragraph are less than, or exceed, the value of milk as required to be computed for such handler pursuant to Sec. 7(a), as shown in a statement rendered by the market administrator on or before the 20th day after the end of such delivery period.

(b) *Errors in payments.* Errors in making any of the payments prescribed in this section shall be corrected not later than the date for making payments next following the determination of such errors.

(c) *Butterfat differential.* If any producer has delivered to any handler during any delivery period milk having an average butterfat content other than 3.5 percent, such handler shall, in making the payments prescribed by subparagraphs (1) and (2) of paragraph (a) of this section to such producer, add for each one-tenth of 1 percent of average butterfat content above 3.5 percent or deduct for each one-tenth of 1 percent of average butterfat content below 3.5 percent 4 cents per hundredweight.

(d) *Location adjustments in making payments to producers.* (1) In making the payments to producers pursuant to subparagraphs (1) and (2) of paragraph (a) of

this section, handlers may deduct, with respect to all milk received by a handler from a producer at a country plant located more than 70 miles from the marketing area, 2 cents per hundredweight for each 15 miles or part thereof in excess of 70 miles from the marketing area.

* * *

Sec. 10. *Marketing services.* (a) *Marketing service deduction.* In making payments to producers and new producers pursuant to Sec. 8 each handler shall, with respect to all milk delivered by each producer and new producer during each delivery period, except as set forth in paragraph (b) of this section, deduct 3 cents per hundredweight, or such lesser amount as the market administrator shall determine to be sufficient, and shall, on or before the *25th* day after the end of such delivery period, pay such deductions to the market administrator. Such moneys shall be expended by the market administrator only in providing for market information to, and for verification of weights, samples, and tests of milk delivered by, such producers and new producers. The market administrator may contract with an association or associations of producers for the furnishing of the whole or any part of such services to, or with respect to the milk delivered by, such producers and new producers.

(b) *Marketing service deductions with respect to members of a producers' cooperative association.* In the case of producers and new producers for whom a cooperative association is actually performing the services set forth in paragraph (a) of this section each handler shall, in lieu of the deductions specified in paragraph (a) of this section, make such deductions from payments made pursuant to Sec. 8 as may be authorized by such producers and new producers, and pay over on or before the *25th* day after the end of each delivery period such deduction to the asso-

ciations rendering such service of which such producers and new producers are members.

* * *

Roland W. Bartlett, Professor in the School of Economics at the University of Illinois (Transcript of Testimony, Defts' Ex. 3, p. 166):

"'In the Chicago Market from 1907 to 1919, the country plant price received by dairymen averaged $1.91 per 100 pounds of 3.5 per cent milk and the condensery price, $1.90. Since 1919, producers have received a premium above the condensery price. From 1920 to 1929, this averaged 38 cents per 100 pounds. From 1933 to 1937, the premium again averaged 38 cents, though both series of prices were at a considerably lower level than in 1920-29. For the first eight months of 1938, the premium has averaged 43 cents per 100 pounds of milk.'" (Taken from Exhibit No. 36, p. 203, contained in Defts' Ex. 2)

Mr. M. J. Metzger, representing Bowman Dairy Company (Transcript of Testimony, Defts' Ex. 3, pp. 371, 372):

"I would like to mention, just make a few remarks in reference to class 3. I believe that as provided in the statement by Mr. Cosgrove yesterday, that provides only for prices for butter and cheese. In this market in the past, there have been other demands for excess or surplus milk that returned slightly in excess of butter and cheese at times, such as milk or cream, that goes into cream cheese. There are at times a demand for that.

"There have been times when there has been a demand for milk for chocolate, chocolate candy, chocolate bars, and that sort of thing, and there have been times that milk could be sold, surplus milk could be sold, usually at a price sufficiently under the regular price, for evaporated milk to evaporators, which again would return a better price than butter and cheese.

"I cannot quite understand in my own mind why butter and cheese is provided for in this proposal here, and that cream shall be on a competitive basis and milk for fluid purposes for consumers' use be set up on a pedestal."

Mat Wallrich, Representative of several individual co-operative organizations organized under the Wisconsin Co-Operative Law (Transcript of Testimony, Defts' Ex. 3, p. 523):

"In view of the numerous amendments and suggested revisions of the submitted proposal and also in view of the suggested amendments that will be offered at this time, it is my personal thought that in fairness to the producers who are members of the organizations that I represent, and also in fairness to all producers in this market, that the Secretary, if he determines from the evidence that an order is feasible for this market, submit a tentative draft of the completed or revised order for further study by these producers in order that they may make definite recommendations based upon a tangible definite proposal, and that this tentative proposal be submitted prior to its submission for a referendum vote."

Table 1. - Index numbers of prices paid by farmers for commodities bought
(1910 - 1914 = 100)

Year	Jan.	Feb.	March	April	May	June	July	August	Sept.	Oct.	Nov.	Dec.	Average
1910													98
1911													101
1912													100
1913													101
1914													100
1915													105
1916													124
1917													149
1918													176
1919													202
1920													201
1921													152
1922													148
1923			152	152	153	153	152	152	151	151	150	150	152
1924	151	151	152	151	151	150	151	151	152	153	153	154	152
1925	155	157	158	158	158	158	157	156	155	155	155	155	157
1926	155	156	156	156	156	156	156	155	155	155	154	154	155
1927	153	153	152	153	153	154	154	153	153	153	152	152	153
1928	153	153	154	155	155	156	156	155	155	155	154	154	155
1929	154	155	155	154	154	153	153	154	154	153	153	152	153
1930	151	151	150	149	149	148	147	145	144	142	140	138	145
1931	136	134	132	130	129	127	125	123	121	120	118	117	124
1932	115	114	112	111	109	108	107	107	106	105	104	103	107
1933	102	101	100	101	102	103	107	112	116	116	116	116	109
1934	117	119	120	120	121	121	122	125	126	126	126	126	123
1935	126	127	127	127	127	127	126	125	123	123	122	122	125
1936	122	122	121	121	121	120	123	126	127	127	127	128	124
1937	130	132	132	134	134	134	133	132	130	128	127	126	130
1938	126	126	125	125	125	124	123	122	121	121	121	120	123 1/
1939	120	120	120	120 1/	120 1/								

1/ Preliminary.
Compiled from reports of the Bureau of Agricultural Economics.

Table 4.- Prices paid producers per hundredweight of milk Chicago, Illinois, 1909-1933

Year	Jan.	Feb.	March	April	May	June	July	August	Sept.	Oct.	Nov.	Dec.	Average
	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars
1909	1.35	1.55	1.45	1.40	1.10	.95	1.05	1.25	1.35	1.55	1.70	1.75	1.39
1910	1.75	1.70	1.55	1.45	1.20	1.05	1.20	1.45	1.60	1.70	1.90	2.00	1.55
1911	2.00	1.90	1.70	1.30	1.10	1.00	1.30	1.45	1.45	1.70	1.85	1.90	1.55
1912	1.85	1.80	1.65	1.30	1.05	1.00	1.30	1.45	1.50	1.60	1.75	1.80	1.50
1913	1.75	1.70	1.60	1.55	1.30	1.10	1.40	1.55	1.55	1.65	1.75	1.85	1.56
1914 1/	1.85	1.75	1.65	1.45	1.20	1.05	1.35	1.50	1.50	1.75	1.85	1.85	1.56
1915	1.85 1/	1.85 1/	1.65 1/	1.45 2/	1.23	1.05	1.31	1.54	1.55	1.73	1.85 2/	1.85 2/	1.58
1916	1.83	1.73	1.61	1.67	1.47	1.26	1.55	1.74	1.70	1.90	2.10	2.13	1.72
1917	2.05	2.00	1.85	2.40	2.00	1.60	2.12	2.30	2.30	3.42	3.22	3.22	2.37
1918	3.22	3.07	2.90	2.65	2.05	1.80	2.30	2.75	2.92	3.32	3.68	3.17	2.87
1919	3.75	3.50	3.00	2.80	2.50	2.50	3.00	3.52	3.55	3.63	3.60	3.65	3.25
1920	3.60	3.35	2.90	2.75	2.70	2.75	3.20	3.70	3.70	3.70	3.05	2.60	3.16
1921	2.50	2.35	2.35	2.35	2.05	2.05	2.30	2.30	1.50	1.75	1.75	1.75	2.08
1922	1.75	1.70	1.70	1.70	1.70	1.60	2.00	2.05	2.00	2.05	2.05	2.10	1.86
1923	2.50	2.50	2.40	2.40	2.30	2.25	2.75	2.75	2.75	2.75	2.75	2.75	2.57
1924	2.675	2.675	2.675	2.50	2.30	2.30	2.50	2.60	2.60	2.40	2.40	2.40	2.50
1925	2.40	2.40	2.40	2.40	2.35	2.30	2.50	2.55	2.55	2.55	2.55	2.50	2.45
1926	2.50	2.50	2.50	2.75	2.50	2.40	2.50	2.60	2.60	2.55	2.50	2.50	2.53
1927	2.50	2.50	2.50	2.50	2.40	2.40	2.50	2.50	2.50	2.50 2	2.50	2.50	2.48
1928	2.50	2.50	2.50	2.50	2.40	2.40	2.50	2.50	2.50	2.50	2.50	2.50	2.48
1929	2.65	2.65	2.65	2.65	2.65	2.65	2.65	2.65	2.75	2.75	2.75	2.75	2.683
1930	2.67	2.67	2.67	2.67	2.67	2.67	2.67	2.67	2.67	2.67	2.67	2.67	2.67
1931	2.32	2.32	2.32	2.32	2.32	2.32	2.32	2.32	2.32	2.32	2.32	2.32	2.32
1932	2.01	2.01	2.01	2.01	2.01	1.85	1.85	1.85	1.85	1.85	1.85	1.45	1.863
1933	1.45	1.45	1.45	1.45	1.45- 1.75	1.75	1.75	1.75	1.75	1.75	1.45- 2.10	1.45- 2.10	1.66

1/ 10 cents premium for 3.8% milk.
2/ Price for 3.5% milk.
Supplied by market administrator in letter of June 2, 1937.

Table 5.- Dealers' buying prices of 3.5% milk per hundredweight Chicago, Illinois, 70-mile zone, and Milwaukee, Kenosha, Racine, South Bend and Rockford, f.o.b. city, 1919-1938

Year	Chicago Illinois, 70-mile zone	F.O.B. City				
		Milwaukee, Wisconsin	Kenosha, Wisconsin	Racine Wisconsin	South Bend: Indiana	Rockford Illinois
	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars
1919	-	3.79	-	-	3.37	3.27
1920	-	3.37	-	-	3.30	-
1921	2.09	2.17	-	-	2.29	2.09
1922	1.86	2.23	-	-	2.04	1.90
1923	2.57	2.84*	-	-	2.43	2.59
1924	2.48	2.75	-	-	2.64	2.68
1925	2.425	2.50	-	-	2.58	2.44
1926	2.52	2.80	-	-	2.55	2.55
1927	2.49	2.93*	3.00	-	2.47	2.55
1928	2.48	2.97*	3.04	-	2.45	2.65
1929	2.67	3.00*	3.15	-	2.50	-
1930	2.67*	2.95*	3.05	-	2.44	2.85
1931	2.32*	2.48*	2.69	-	1.91*	-
1932	1.88*	1.85*	2.11	-	1.82*	1.46
1933	1.70*	1.84*	1.67	-	1.83*	1.36*
1934	2.00*	2.03*	2.00*	2.05*	1.83*	1.68*
1935	-	2.08*	2.03*	2.02*	2.01*	1.85*
1936	1.95*	2.34*	2.34*	2.29*	2.18*	1.90*
1937	2.16*	2.71*	2.75*	2.70*	2.37*	2.05*
1938	1.85*	2.71*	2.75*	2.70*	2.33*	-

* Milk used for city distribution in fluid form.

Compiled from reports of the Bureau of Agricultural Economics.

Table 6.- Milk, whole: Wholesale prices per hundredweight received by farmers in Illinois, 1909-1939

Year	Jan.	Feb.	March	April	May	June	July	August	Sept.	Oct.	Nov.	Dec.	Average
	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars
1909								1.25	1.35	1.55	1.65	1.75	
1910	1.75	1.70	1.55	1.45	1.15	1.05	1.20	1.30	1.45	1.70	1.85	1.95	1.50
1911	1.95	1.90	1.70	1.30	1.10	1.00	1.30	1.45	1.45	1.65	1.80	1.85	1.50
1912	1.85	1.80	1.65	1.30	1.05	1.00	1.25	1.40	1.45	1.60	1.75	1.80	1.45
1913	1.75	1.70	1.60	1.50	1.25	1.15	1.35	1.50	1.55	1.75	1.80	1.90	1.55
1914	1.90	1.75	1.65	1.45	1.20	1.15	1.35	1.50	1.55	1.75	1.85	1.85	1.55
1915	1.85	1.75	1.65	1.45	1.20	1.10	1.30	1.45	1.45	1.65	1.80	1.80	1.50
1916	1.75	1.70	1.60	1.60	1.45	1.25	1.45	1.60	1.65	1.85	2.05	2.10	1.65
1917	2.05	2.00	1.85	2.25	1.90	1.60	2.10	2.25	2.30	3.40	3.20	3.20	2.30
1918	3.20	3.10	2.95	2.65	2.05	1.80	2.30	2.75	2.95	3.35	3.70	3.75	2.80
1919	3.75	3.50	3.05	2.80	2.45	2.55	3.00	3.45	3.65	3.70	3.65	3.70	3.20
1920	3.65	3.35	2.95	2.80	2.75	2.75	3.20	3.55	3.60	3.35	2.95	2.60	3.10
1921	2.45	2.30	2.20	2.20	1.95	1.80	2.00	2.10	1.65	1.80	1.85	1.80	2.00
1922	1.75	1.60	1.60	1.55	1.55	1.50	1.80	1.90	1.90	2.00	2.10	2.25	1.75
1923	2.50	2.45	2.35	2.30	2.15	2.10	2.45	2.50	2.55	2.60	2.60	2.60	2.40
1924	2.60	2.55	2.50	2.30	2.10	2.05	2.25	2.30	2.35	2.25	2.25	2.25	2.30
1925	2.40	2.25	2.20	2.15	2.10	2.05	2.25	2.30	2.35	2.40	2.40	2.40	2.25
1926	2.40	2.35	2.35	2.30	2.20	2.15	2.25	2.35	2.40	2.40	2.45	2.45	2.30
1927	2.45	2.40	2.40	2.36	2.15	2.10	2.20	2.25	2.35	2.40	2.45	2.45	2.30
1928	2.45	2.40	2.35	2.30	2.15	2.15	2.30	2.30	2.35	2.40	2.45	2.45	2.35
1929	2.50	2.50	2.40	2.30	2.20	2.15	2.25	2.35	2.40	2.45	2.50	2.45	2.35
1930	2.35	2.25	2.25	2.20	2.10	2.00	2.10	2.20	2.25	2.25	2.20	2.10	2.20
1931	1.85	1.80	1.80	1.75	1.65	1.65	1.80	1.80	1.85	1.90	1.85	1.75	1.80
1932	1.45	1.45	1.40	1.35	1.30	1.25	1.30	1.30	1.35	1.35	1.35	1.15	1.35
1933	1.10	1.10	1.10	1.10	1.15	1.20	1.30	1.30	1.35	1.35	1.45	1.40	1.25
1934	1.30	1.30	1.35	1.30	1.30	1.40	1.45	1.50	1.50	1.55	1.55	1.65	1.45
1935	1.65	1.65	1.65	1.65	1.45	1.35	1.35	1.40	1.45	1.50	1.60	1.75	1.50
1936	1.75	1.75	1.70	1.60	1.45	1.55	1.80	1.95	2.00	2.00	2.00	2.00	1.80
1937	2.00	2.00	2.00	1.85	1.75	1.70	1.70	1.85	1.95	2.05	2.10	2.10	1.90
1938	2.00	1.90	1.80	1.70	1.55	1.50	1.50	1.55	1.60	1.65	1.65	1.70	1.68
1939	1.65	1.55	1.55	1.45	1.40								

Compiled from reports of the Bureau of Agricultural Economics.

Table 7.- Milk, whole: Wholesale price per hundredweight received by farmers in Indiana, 1909-1939

Year	Jan.	Feb.	March	April	May	June	July	August	Sept.	Oct.	Nov.	Dec.	Average
	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars
1909								1.35	1.45	1.55	1.90	1.90	
1910	1.95	1.90	1.80	1.70	1.45	1.35	1.35	1.45	1.50	1.80	1.95	2.10	1.65
1911	2.10	2.10	1.95	1.65	1.35	1.30	1.35	1.50	1.55	1.70	1.85	2.00	1.65
1912	1.95	1.90	1.80	1.60	1.35	1.30	1.40	1.60	1.65	1.70	1.95	2.00	1.65
1913	2.00	1.95	1.90	1.80	1.45	1.40	1.45	1.60	1.70	1.80	2.05	2.10	1.75
1914	2.10	2.05	1.95	1.80	1.45	1.35	1.50	1.65	1.70	1.80	2.00	2.10	1.75
1915	2.10	2.05	1.95	1.75	1.45	1.40	1.40	1.55	1.55	1.65	1.85	2.00	1.70
1916	2.15	2.05	1.95	1.90	1.65	1.55	1.60	1.70	1.85	2.00	2.30	2.40	1.90
1917	2.35	2.30	2.20	2.25	2.25	2.10	2.20	2.35	2.50	3.05	3.30	3.35	2.50
1918	3.35	3.25	2.95	2.70	2.45	2.15	2.35	2.70	3.00	3.30	3.60	3.80	2.90
1919	3.75	3.45	3.30	3.20	2.95	2.85	3.00	3.30	3.40	3.65	3.80	3.90	3.35
1920	3.80	3.65	3.35	3.25	3.10	2.90	3.00	3.20	3.30	3.35	3.15	2.95	3.25
1921	2.80	2.55	2.50	2.40	2.15	1.95	2.20	2.30	2.05	2.10	2.15	2.20	2.25
1922	2.10	1.95	1.90	1.85	1.80	1.75	1.85	2.00	2.10	2.20	2.35	2.50	2.00
1923	2.60	2.60	2.55	2.50	2.40	2.30	2.40	2.55	2.60	2.70	2.75	2.85	2.55
1924	2.80	2.70	2.65	2.50	2.20	2.10	2.10	2.20	2.25	2.25	2.30	2.40	2.35
1925	2.40	2.35	2.30	2.25	2.20	2.15	2.25	2.30	2.40	2.55	2.60	2.65	2.35
1926	2.60	2.55	2.45	2.40	2.30	2.25	2.30	2.30	2.35	2.45	2.55	2.65	2.40
1927	2.65	2.60	2.55	2.50	2.40	2.30	2.30	2.40	2.45	2.50	2.60	2.70	2.50
1928	2.65	2.60	2.55	2.45	2.40	2.35	2.35	2.40	2.55	2.60	2.75	2.75	2.50
1929	2.75	2.65	2.65	2.55	2.40	2.35	2.40	2.40	2.50	2.55	2.65	2.60	2.50
1930	2.50	2.40	2.30	2.25	2.15	2.05	2.05	2.15	2.25	2.30	2.25	2.15	2.25
1931	2.00	1.80	1.75	1.65	1.60	1.55	1.60	1.65	1.75	1.80	1.80	1.80	1.70
1932	1.65	1.55	1.50	1.40	1.30	1.20	1.25	1.25	1.35	1.40	1.45	1.45	1.40
1933	1.30	1.25	1.20	1.20	1.20	1.25	1.35	1.35	1.40	1.50	1.50	1.40	1.30
1934	1.40	1.50	1.50	1.40	1.35	1.40	1.40	1.50	1.50	1.55	1.60	1.65	1.45
1935	1.65	1.65	1.60	1.55	1.50	1.50	1.50	1.50	1.50	1.55	1.60	1.80	1.55
1936	1.80	1.80	1.80	1.75	1.70	1.60	1.80	2.00	2.00	2.10	2.20	2.20	1.90
1937	2.20	2.10	2.10	2.05	1.95	1.85	1.85	2.00	2.10	2.15	2.25	2.25	2.05
1938	2.05	2.00	1.90	1.85	1.65	1.60	1.65	1.65	1.75	1.75	1.80	1.80	1.80
1939	1.80	1.80	1.65	1.60	1.55								

Compiled from reports of the Bureau of Agricultural Economics.

Table 8.- Milk, whole: Wholesale prices per hundredweight received by farmers in Wisconsin, 1909 - 1939

Year	Jan.	Feb.	March	April	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	Average
	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars
1909								1.15	1.27	1.35	1.42	1.51	
1910	1.44	1.36	1.25	1.20	1.12	1.09	1.11	1.21	1.28	1.30	1.37	1.38	1.24
1911	1.28	1.20	1.08	.94	.89	.94	1.04	1.14	1.21	1.34	1.49	1.54	1.14
1912	1.56	1.44	1.31	1.24	1.19	1.09	1.13	1.18	1.30	1.41	1.53	1.57	1.30
1913	1.50	1.43	1.36	1.27	1.16	1.16	1.16	1.25	1.39	1.45	1.50	1.61	1.33
1914	1.56	1.46	1.35	1.25	1.13	1.13	1.17	1.27	1.32	1.37	1.45	1.46	1.31
1915	1.42	1.38	1.32	1.32	1.22	1.18	1.11	1.14	1.24	1.34	1.53	1.62	1.30
1916	1.56	1.60	1.61	1.47	1.31	1.27	1.25	1.45	1.69	1.86	1.94	2.05	1.55
1917	1.98	2.04	2.02	2.08	2.00	1.92	1.92	2.14	2.42	2.62	2.71	2.82	2.18
1918	2.84	2.80	2.51	2.25	2.09	1.96	2.14	2.38	2.75	3.25	3.56	3.64	2.60
1919	3.13	2.80	2.75	2.64	2.59	2.66	2.72	2.86	2.87	3.03	3.22	3.28	2.85
1920	3.22	2.96	2.70	2.70	2.62	2.44	2.46	2.56	2.57	2.46	2.38	2.22	2.60
1921	2.07	2.01	2.10	1.86	1.37	1.26	1.39	1.62	1.62	1.75	1.82	1.81	1.69
1922	1.62	1.58	1.57	1.50	1.42	1.44	1.52	1.54	1.65	1.86	2.12	2.29	1.64
1923	2.38	2.29	2.18	2.00	1.91	1.93	1.95	2.00	2.10	2.15	2.21	2.25	2.09
1924	2.26	2.15	2.02	1.72	1.59	1.61	1.63	1.61	1.66	1.66	1.73	1.83	1.77
1925	1.84	1.85	1.88	1.86	1.83	1.82	1.87	1.88	1.91	2.06	2.14	2.12	1.90
1926	2.11	2.04	1.96	1.84	1.80	1.74	1.79	1.82	1.89	2.04	2.15	2.25	1.92
1927	2.25	2.22	2.11	2.05	1.98	1.96	1.98	2.04	2.14	2.28	2.32	2.35	2.11
1928	2.34	2.25	2.15	2.07	2.00	2.03	2.09	2.14	2.18	2.23	2.23	2.25	2.15
1929	2.23	2.17	2.13	2.06	1.98	1.95	1.93	1.98	2.05	2.11	2.09	1.97	2.05
1930	1.81	1.75	1.72	1.68	1.60	1.51	1.52	1.60	1.68	1.69	1.60	1.50	1.63
1931	1.35	1.28	1.23	1.08	1.01	.99	1.03	1.12	1.23	1.29	1.24	1.20	1.15
1932	1.07	.96	.93	.88	.80	.77	.79	.84	.92	.95	.95	.97	.89
1933	.90	.82	.80	.88	.99	1.05	1.08	1.05	1.06	1.08	1.07	.96	.98
1934	.97	1.11	1.13	1.04	1.02	1.06	1.04	1.09	1.10	1.14	1.22	1.26	1.09
1935	1.38	1.45	1.38	1.36	1.27	1.16	1.16	1.22	1.28	1.35	1.48	1.61	1.32
1936	1.58	1.51	1.43	1.32	1.28	1.34	1.52	1.66	1.71	1.66	1.67	1.67	1.51
1937	1.66	1.63	1.62	1.53	1.46	1.44	1.46	1.52	1.64	1.75	1.80	1.78	1.59
1938	1.62	1.49	1.39	1.29	1.23	1.20	1.25	1.20	1.20	1.25	1.20	1.25	1.28
1939	1.25	1.20	1.10	1.10	1.05								

Compiled from reports of the Bureau of Agricultural Economics.

Table 9.- Milk, whole: Wholesale prices per hundredweight received by farmers in Wisconsin, 1909 - 1939

Year	Jan.	Feb.	March	April	May	June	July	August	Sept.	Oct.	Nov.	Dec.	Average
	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars
1909								1.20	1.25	1.45	1.50	1.55	
1910	1.55	1.55	1.40	1.35	1.10	1.10	1.20	1.35	1.50	1.70	1.75	1.75	1.40
1911	1.75	1.70	1.60	1.25	1.05	1.05	1.20	1.35	1.50	1.60	1.75	1.75	1.40
1912	1.65	1.35	1.60	1.30	1.15	1.10	1.25	1.40	1.50	1.70	1.80	1.85	1.45
1913	1.86	1.80	1.60	1.35	1.25	1.20	1.30	1.45	1.55	1.75	1.80	1.90	1.55
1914	1.85	1.85	1.75	1.45	1.25	1.20	1.35	1.45	1.55	1.75	1.80	1.80	1.55
1915	1.85	1.85	1.75	1.40	1.25	1.20	1.35	1.45	1.55	1.70	1.75	1.85	1.55
1916	1.75	1.70	1.65	1.40	1.30	1.25	1.45	1.65	1.70	2.00	2.05	2.10	1.65
1917	2.15	2.25	2.15	1.90	1.65	1.65	2.20	2.45	2.55	2.70	2.80	3.25	2.25
1918	3.30	3.20	3.15	2.75	2.35	2.10	2.45	2.90	3.20	3.40	3.55	3.85	2.95
1919	3.75	3.60	3.30	3.15	3.00	2.90	3.25	3.70	3.80	3.90	3.90	3.90	3.45
1920	3.80	3.75	3.55	3.40	3.10	3.05	3.35	3.45	3.70	3.50	3.45	2.70	3.40
1921	2.55	2.30	2.30	2.30	2.10	1.95	2.00	2.25	2.25	2.25	2.15	2.20	2.20
1922	2.15	2.15	1.95	1.90	1.90	1.85	1.95	2.15	2.20	2.20	2.35	2.55	2.10
1923	2.60	2.50	2.45	2.40	2.30	2.25	2.35	2.60	2.65	2.70	2.55	2.55	2.45
1924	2.45	2.40	2.30	2.10	2.00	1.95	2.05	2.10	2.15	2.20	2.15	2.20	2.15
1925	2.25	2.20	2.20	2.20	2.15	2.10	2.20	2.30	2.30	2.35	2.45	2.45	2.25
1926	2.40	2.35	2.30	2.25	2.15	2.10	2.15	2.30	2.30	2.40	2.45	2.45	2.30
1927	2.45	2.45	2.45	2.40	2.25	2.15	2.20	2.30	2.40	2.45	2.50	2.50	2.35
1928	2.45	2.40	2.35	2.35	2.25	2.15	2.30	2.40	2.45	2.50	2.55	2.55	2.35
1929	2.55	2.50	2.45	2.40	2.30	2.20	2.25	2.40	2.45	2.55	2.55	2.40	2.40
1930	2.25	2.15	2.15	2.10	2.00	1.95	2.00	2.10	2.30	2.20	2.05	1.95	2.10
1931	1.80	1.70	1.65	1.60	1.50	1.55	1.40	1.55	1.60	1.50	1.40	1.35	1.55
1932	1.25	1.20	1.15	1.10	1.10	1.05	1.05	1.05	1.10	1.05	1.05	1.05	1.10
1933	1.05	1.05	1.00	1.00	1.05	1.10	1.20	1.30	1.35	1.35	1.40	1.30	1.15
1934	1.30	1.35	1.40	1.40	1.35	1.35	1.45	1.55	1.55	1.55	1.65	1.65	1.45
1935	1.65	1.70	1.65	1.65	1.50	1.50	1.50	1.55	1.60	1.70	1.75	1.85	1.60
1936	1.90	1.80	1.70	1.70	1.65	[illegible]	1.80	1.90	1.95	1.95	2.00	2.00	1.80
1937	2.00	1.95	1.95	1.95	1.85	1.80	1.85	1.95	2.00	2.10	2.20	2.20	1.95
1938	2.00	1.90	1.85	1.75	1.65	1.55	1.55	1.60	1.65	1.70	1.75	1.80	1.70
1939	1.70	1.65	1.65	1.50	1.45								

Compiled from reports of the Bureau of Agricultural Economics.